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# A Safe Harbor in the Opioid Crisis

## HOW THE FEDERAL GOVERNMENT SHOULD ALLOW STATES TO LEGISLATE FOR SAFE INJECTION FACILITIES IN LIGHT OF THE OPIOID PUBLIC HEALTH EMERGENCY

*“If a terrorist organization was killing 175 Americans a day on American soil, what would we do to stop them? We would do anything and everything. We must do the same to stop the dying caused from within.”<sup>1</sup>*

### INTRODUCTION

In the New York City neighborhood of Washington Heights, there is an infirmary named the Corner Project.<sup>2</sup> As part of the Corner Project’s mission, the “community outreach group” turned “brick and mortar” locale “offer[s] . . . stigma-free health promotion support to individuals and their loved ones that reduce risks associated with drug use . . . and overdose.”<sup>3</sup> In this respect, the Corner Project is true to its word—it offers health and hygiene services, condom distribution, and a syringe exchange program (SEP) that provides free sterile needles to intravenous drug users while also properly disposing of used needles.<sup>4</sup> The Corner Project

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<sup>1</sup> THE PRESIDENT’S COMMISSION ON COMBATING DRUG ADDICTION AND THE OPIOID CRISIS, FINAL REPORT 5 (Nov. 1, 2017) [https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Final\\_Report\\_Draft\\_11-1-2017.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Final_Report_Draft_11-1-2017.pdf) [<https://perma.cc/6AGG-5QWW>] [hereinafter PRESIDENT’S COMMISSION].

<sup>2</sup> See WASH. HEIGHTS CORNER PROJECT, <http://www.cornerproject.org> [<https://perma.cc/XM5R-2NRK>].

<sup>3</sup> WASH. HEIGHTS CORNER PROJECT, *supra* note 2; Sanjay Gupta, *Opioid Addiction and the Most Controversial Bathroom in New York*, CNN (Oct. 26, 2017, 2:20 PM ET), <http://www.cnn.com/2017/10/25/health/opioid-addiction-bathroom-safe-injection-site/index.html> [<https://perma.cc/623J-TM6W>].

<sup>4</sup> See WASH. HEIGHTS CORNER PROJECT, *supra* note 2. The U.S. Department of Health and Human Services (HHS) considers SEPs an effective component of preventing HIV, hepatitis, and other sexually transmitted diseases among intravenous drug users. DEP’T OF HEALTH & HUMAN SERVICES IMPLEMENTATION GUIDANCE TO SUPPORT CERTAIN COMPONENTS OF SYRINGE SERVICE 1 (2016), <https://www.hiv.gov/sites/default/files/hhs-ssp-guidance.pdf> [<https://perma.cc/39T5-86KV>]. Under HHS guidelines, states can receive federal funding for SEPs if they can demonstrate that the “jurisdiction is . . . experiencing, or . . . at risk for significant increases in hepatitis infections or an HIV outbreak due to injection drug use.” See *Syringe Service Programs*, CDC, <https://www.cdc.gov/hiv/risk/ssps.html> [<https://perma.cc/WWY3-WTHX>]. At least seventeen states have passed laws authorizing SEPs

also offers overdose prevention services where, in addition to providing overdose reversal training, it operates a bathroom where drug users are openly permitted to inject heroin and other intravenous drugs.<sup>5</sup> With the exception of an intercom system, this bathroom is a normal bathroom.<sup>6</sup> If a user then does not respond after a period of time, a trained expert in reversing overdoses will unlock and enter the bathroom, and can inject the user with naloxone, a medication effective in instantly reversing overdoses,<sup>7</sup> with the hope of preventing any possible overdose.<sup>8</sup> Effectively, “the Corner Project has implemented a safety net to make sure that people don’t die from overdoses in the bathroom in their building.”<sup>9</sup> Without bathrooms like the Corner Project’s, intravenous heroin users are relegated to using in places like abandoned buildings or cars where they are at high risk of accidental overdose and death.<sup>10</sup> Although the Corner Project’s mission may seem controversial, in 2016 the New York State Department of Health recommended procedures on how SEPs can prevent overdoses in their bathrooms.<sup>11</sup> Moreover, the Corner Project’s overdose prevention bathroom operates as an unofficial version of what New York City hopes will be the first government-supervised safe injection facility, or SIF, in the United States.<sup>12</sup>

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statewide and there are approximately 333 SEPs operating nationwide. See *Laws Related to Syringe Exchange*, CDC, <https://www.cdc.gov/hepatitis/policy/SyringeExchange.htm> [<https://perma.cc/FVJ7-UHQPJ>]; Josh Katz, *Why a City at the Center of the Opioid Crisis Gave Up A Tool to Fight It*, N.Y. TIMES (Apr. 27, 2018), <https://www.nytimes.com/interactive/2018/04/27/upshot/charleston-opioid-crisis-needle-exchange.html> [<https://perma.cc/7LW5-LUQR>].

<sup>5</sup> See Gupta, *supra* note 3.

<sup>6</sup> See *id.*

<sup>7</sup> “Naloxone is a . . . medication that nearly instantaneously reverses opioid overdoses by stopping the effects that heroin and other opioids have on the brain.” Christopher T. Creech, Comment, *Increasing Access to Naloxone: Administrative Solutions to the Opioid Overdose Crisis*, 68 ADMIN. L. REV. 517, 519 (2016).

<sup>8</sup> See Gupta, *supra* note 3.

<sup>9</sup> See *id.*

<sup>10</sup> INJECTION DRUG USERS HEALTH ALL., HARM REDUCTION IN NEW YORK: CITYWIDE EVALUATION STUDY, 11 (2015), <http://iduha.org/research/#fb0=1> [<https://perma.cc/GT7G-Z9CZ>] (explaining that nearly two-thirds of drug users inject in places like abandoned buildings, cars, or public bathrooms).

<sup>11</sup> N.Y. STATE DEP’T OF HEALTH AIDS INST., POLICIES AND PROCEDURES: SYRINGE EXCHANGE PROGRAM, 11 (2016), [https://www.health.ny.gov/diseases/aids/consumers/prevention/needles\\_syringes/syringe\\_exchange/docs/policies\\_and\\_procedures.pdf](https://www.health.ny.gov/diseases/aids/consumers/prevention/needles_syringes/syringe_exchange/docs/policies_and_procedures.pdf) [<https://perma.cc/WYP2-H2H6>] (“Internal agency response protocols should be established in the event of a possible emergency, including an overdose.”); *id.* (“The agency should also consider having an intercom system so agency staff can communicate with participants using the bathroom . . .”).

<sup>12</sup> Greg B. Smith and Chelsia Rose Marcius, *Couple Behind NYC Safe-Injection Program Was Forced to Resign From Drug Site in Canada*, DAILY NEWS (July 15, 2018, 4:00 AM), <https://www.nydailynews.com/new-york/ny-metro-injection-site-scandal-2018-0709-story.html> [<https://perma.cc/5PBX-9ELB>].

Establishing a supervised facility where users can inject drugs is not a new concept.<sup>13</sup> SIFs, or legally sanctioned facilities where intravenous drug users can inject pre-obtained drugs under medical supervision,<sup>14</sup> have been operating outside of the United States since the 1980s.<sup>15</sup> SIFS are aimed at minimizing the harm associated with intravenous drug usage—while they do not necessarily prevent drug use, they reduce the harm caused by a drug addicted lifestyle.<sup>16</sup> SIFs are proven to reduce the harm associated with heroin injection by providing clean needles to prevent the transmission of infectious diseases, “encourag[ing] marginalized people to access . . . primary care and addiction treatment,” and preventing drug overdoses.<sup>17</sup> Unlike SEPs, which only offer clean needles to drug users and do not monitor or provide a dedicated location for drug injection, SIFs are more effective at preventing overdoses because they allow a medical or overdose professional to respond to overdoses immediately.<sup>18</sup>

In 2003, Insite, a SIF in Vancouver, opened as the first SIF in North America.<sup>19</sup> Unlike the Corner Project, “Insite has injection booths where [drug users can] inject . . . illicit drugs under the supervision of nurses and health care staff.”<sup>20</sup> If an overdose occurs,

<sup>13</sup> See Lawrence O. Gostin, James G. Hodges, Jr., & Chelsea L. Gulinson, *Supervised Injection Facilities: Legal and Policy Reforms*, 321 JAMA 745, 745 (2019) (explaining that the first SIF was established in Switzerland in 1986).

<sup>14</sup> See *Supervised Consumption Services*, DRUG POLICY ALL., <http://www.drugpolicy.org/issues/supervised-injection-facilities> [<https://perma.cc/8XSV-DTKH>].

<sup>15</sup> See *Overdose Prevention Sites, Also Known As Supervised Consumption Facilities and Safe Injection Facilities*, DRUG WAR FACTS, [http://www.drugwarfacts.org/chapter/supervised\\_consumption](http://www.drugwarfacts.org/chapter/supervised_consumption) [<https://perma.cc/BJN3-4V76>] (explaining the first SIF was opened in Bern, Switzerland in 1986). “There are [currently about] 120 [SIFs] operating in twelve countries around the world (Australia, Canada, Denmark, France, Germany, Luxembourg, the Netherlands, Norway, Spain and Switzerland).” *Supervised Consumption Services*, *supra* note 14.

<sup>16</sup> See James L. Nolan, Jr., *Harm Reduction and the American Difference: Drug Treatment and Problem-Solving Courts in Comparative Perspective*, 13 J. HEALTH CARE L. & POL’Y 31, 34 (2010).

<sup>17</sup> See *Supervised Consumption Sites*, VANCOUVER COASTAL HEALTH, <http://www.vch.ca/public-health/harm-reduction/supervised-consumption-sites> [<https://perma.cc/2CZK-HF8D>].

<sup>18</sup> Both SEPs and SIFs have been found to be effective in decreasing overdoses, however, SEPs’ effectiveness is generally attributable to SEPs connecting users to addiction treatment, not through real-time overdose intervention. *Public Support for Needle Exchange Programs, Safe Injection Sites Remains Low in U.S.*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH (June 5, 2018), <https://www.jhsph.edu/news/news-releases/2018/public-support-for-needle-exchange-programs-safe-injection-sites-remains-low-in-US.html> [<https://perma.cc/NQY4-TFMS>]; German Lopez, *Needle Exchanges Help Combat the Opioid Crisis. So Why Was the One in Orange County Shut Down?*, VOX (May 29, 2018, 8:00 AM EDT) <https://www.vox.com/science-and-health/2018/5/29/17389048/needle-exchange-opioid-epidemic-orange-county> [<https://perma.cc/S72Z-KQUU>].

<sup>19</sup> See *Supervised Consumption Sites*, *supra* note 17.

<sup>20</sup> *Insite—Supervised Consumption Site*, VANCOUVER COASTAL HEALTH, [http://www.vch.ca/locations-services/result?res\\_id=964](http://www.vch.ca/locations-services/result?res_id=964) [<https://perma.cc/EP7C-TN8C>].

the healthcare team intervenes immediately.<sup>21</sup> The facility operates under a Canadian law that exempts the site from federal prosecution.<sup>22</sup> There are currently no operating SIFs in the United States, however, there is a growing call for their implementation: state sanctioned SIFs have been approved in three cities including New York City, Seattle, and Philadelphia.<sup>23</sup> At least a dozen other cities and states have considered or are currently considering opening a SIF.<sup>24</sup>

Critics of SIFs argue that these sites normalize drug use, “do nothing to deter drug use or [offer assistance to] drug addicts,” and are a government facilitation of drug use, similar to the fictional drug tolerant “free zones” in the HBO series “The Wire.”<sup>25</sup> A 2018 study by the European Monitoring Centre for Drugs and Drug Addiction, however, found that there is no evidence suggesting that SIFs increase drug use or frequency of injection; rather, the study found that SIFs “facilitate rather

<sup>21</sup> *Id.*

<sup>22</sup> See *Supervised Consumption Sites*, *supra* note 17.

<sup>23</sup> See Azeen Ghorayshi, *The Feds Say Safe Injection Sites Are Illegal. Here Are All the Places Considering Them Anyway*, BUZZFEED NEWS, (Sept. 6, 2018, 10:41 AM ET) <https://www.buzzfeednews.com/article/azeenghorayshi/safe-injection-site-proposals-map> [<https://perma.cc/34AJ-RR69>].

<sup>24</sup> See Ghorayshi, *supra* note 23. These include Ithaca, New York; New Haven, Connecticut; Burlington, Vermont (although similar statewide proposals have been rejected); Madison, Wisconsin; Washington, D.C.; and Rhode Island. See *id.*; *Opioid Counsel Rejects Safe Injection Site Idea*, U.S. NEWS & WORLD REP. (Sept. 4, 2018, 10:12 AM), <https://www.usnews.com/news/best-states/vermont/articles/2018-09-14/opioid-council-rejects-safe-injection-site-idea> [<https://perma.cc/5DQH-3URA>]. SIF proposals have been rejected in Maine, Missouri, Denver, Colorado, and Boston, Massachusetts. See John Frank, *Denver Wants to Pursue a Safe Injection Site For Heroin Users. Colorado Lawmakers Told Them No*, DENVER POST (Feb. 14, 2018, 7:08 PM), <https://www.denverpost.com/2018/02/14/safe-injection-bill-colorado-fails/> [<https://perma.cc/96Q8-7M5M>]; Felice J. Freyer, *State Senate Nixes Plan for Drug Injection Site Designed to Prevent Overdose Deaths*, BOS. GLOBE (July 19, 2018), <https://www.bostonglobe.com/metro/2018/07/19/baker-opposes-plan-for-safe-drug-injection-site/QaaViTwnonds2gyeOC9BnN/story.html> [<https://perma.cc/V55K-L6WS>]; Scott Thistle, *Committee Rejects Bill That Would Set Up Safe Places for Using Illegal Drugs*, PRESS HERALD (May 18, 2017), <https://www.pressherald.com/2017/05/18/committee-rejects-bill-that-would-set-up-safe-places-for-illegal-drugs/> [<https://perma.cc/5TNB-STNA>]; *Votes MO HB2367*, LEGISCAN, <https://legiscan.com/MO/votes/HB2367/2018> [<https://perma.cc/J3KU-CUGW>] (Missouri’s House bill legalizing SIF is “dead.”).

<sup>25</sup> Wendy Stueck, *The Arguments for and Against Vancouver’s Supervised Injection Site*, GLOBE & MAIL (May 1, 2018), <https://beta.theglobeandmail.com/news/british-columbia/the-arguments-for-and-against-vancouvers-supervised-injection-site/article596153/?ref=http://www.theglobeandmail.com&> [<https://perma.cc/YNP3-HDYL>]. The United States Department of Justice has made similar arguments, saying “[s]uch facilities would . . . threaten to undercut existing and future prevention initiatives by sending exactly the wrong message: . . . the government will help you use heroin.” Press Release, U.S. Atty’s Office, Dist. of Vt., Statement of the U.S. Attorney’s Office Concerning Proposed Injection Sites, (Dec. 13, 2017), <https://www.justice.gov/usao-vt/pr/statement-us-attorney-s-office-concerning-proposed-injection-sites> [<https://perma.cc/2SZ7-D7AG>]; see also Paul Owen, *The Wire Re-up, Season Three, Episode Nine—Is Amsterdam Realistic?*, GUARDIAN (Oct. 12, 2009, 7:15 PM), <https://www.theguardian.com/media/organgrinder/2009/oct/13/wire-drugs-season-3-episode-9> [<https://perma.cc/28HD-P3GD>].

than delay treatment” and “do not result in higher rates of local drug-related crime.”<sup>26</sup>

Another criticism of SIFs is that they are illegal.<sup>27</sup> In an August 2018 op-ed in the *New York Times*, United States Deputy Attorney General Rod Rosenstein wrote that “[i]t is a federal felony to maintain any location for the purpose of facilitating illicit drug use.”<sup>28</sup> The federal Controlled Substances Act (CSA), does, in fact, make it a felony to use, possess, or facilitate the use of heroin and other opioids.<sup>29</sup> This federal law, however, is in tension with states’ power and responsibility to enact legislation protecting the health, safety, and welfare of its citizenry.<sup>30</sup> Yet Deputy Attorney General Rosenstein went on to say that “cities and counties should expect the Department of Justice to meet the opening of any injection site with swift and aggressive action.”<sup>31</sup> In a December 2017 statement, the Department of Justice (DOJ) emphasized that “proposed SIFs would violate several federal criminal laws,” and that “exposure to criminal charges would arise for users and SIF workers and overseers.”<sup>32</sup> In February 2019, the District Attorney for the Eastern District of Pennsylvania proved that the Deputy Attorney General Rosenstein’s words were not just empty threats: it filed a civil lawsuit against Safehouse, a Philadelphia nonprofit organization planning to open a SIF in Philadelphia, seeking a judicial decree that SIFs would violate federal law.<sup>33</sup> The lawsuit alleges that Safehouse

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<sup>26</sup> EUROPEAN MONITORING CENTRE FOR DRUGS AND DRUG ADDICTION, DRUG CONSUMPTION ROOMS: AN OVERVIEW OF PROVISION AND EVIDENCE 6 (June 7, 2018), [http://www.emcdda.europa.eu/topics/pods/drug-consumption-rooms\\_en](http://www.emcdda.europa.eu/topics/pods/drug-consumption-rooms_en) [hereinafter EUROPEAN MONITORING CENTRE FOR DRUGS AND DRUG ADDICTION] (<https://perma.cc/7ESE-3TN5>).

<sup>27</sup> See Rod J. Rosenstein, *Fight Drug Abuse, Don’t Subsidize It*, N.Y. TIMES (Aug. 27, 2018), <https://www.nytimes.com/2018/08/27/opinion/opioids-heroin-injection-sites.html> [<https://perma.cc/R4FM-4FJY>] (“One obvious problem with injection sites is that they are illegal.”).

<sup>28</sup> *Id.*

<sup>29</sup> See *infra* Section II.A.1. (explaining the Controlled Substances Act).

<sup>30</sup> See *infra* II.A.2. (explaining the relationship between state and federal lawmaking power).

<sup>31</sup> Rosenstein, *supra* note 27. Deputy Attorney General Rosenstein also issued a warning on NPR member station WHYY in Philadelphia stating, “[safe consumption sites] remain[] illegal under federal law. And people engaged in that activity remain vulnerable to civil and criminal enforcement.” Bobby Allen, *Justice Department Promises Crackdown on Supervised Injection Facilities*, NPR ONE (Aug. 30, 2018, 4:02 PM ET), <https://one.npr.org/?sharedMediaId=642735759:643218484> [<https://perma.cc/NZV3-SHFK>].

<sup>32</sup> Press Release, U.S. Atty’s Office, Dist. of Vt., *supra* note 25.

<sup>33</sup> Press Release, U.S. Atty’s Office, E. Dist. of Pa., Civil Lawsuit Filed to Seek Judicial Declaration That Drug Injection Site Is Illegal Under Federal Law (Feb. 6, 2019), <https://www.justice.gov/usao-edpa/pr/civil-lawsuit-filed-seek-judicial-declaration-drug-injecti-on-site-illegal-under-federal> [<https://perma.cc/F9EB-TWMP>]; Katie Zezima, *Justice Department Sues Philadelphia Over Supervised Injection Facility That Aims to Prevent Fatal Drug Overdoses*, WASH. POST (Feb. 6, 2019), [https://www.washingtonpost.com/national/justice-department-sues-philadelphia-over-supervised-injection-facility-that-aims-to-prevent-fatal-drug-overdoses/2019/02/06/ed9815a4-2a55-11e9-984d-9b8fba003e81\\_story.html](https://www.washingtonpost.com/national/justice-department-sues-philadelphia-over-supervised-injection-facility-that-aims-to-prevent-fatal-drug-overdoses/2019/02/06/ed9815a4-2a55-11e9-984d-9b8fba003e81_story.html) [<https://perma.cc/3VFD-CNGB>].

would violate a provision of the CSA that makes it illegal to “manage or control any place . . . and . . . make available for use . . . the place for the purpose of unlawfully . . . using a controlled substance.”<sup>34</sup> Safehouse maintains that SIFs are legal and plans to move ahead with seeking funds and a location for its SIF.<sup>35</sup>

Officials in other cities say they will move forward with their plans, despite the DOJ’s threats.<sup>36</sup> In New York City, for example, Mayor William de Blasio has said that he will “take the Trump Administration to court” if the DOJ decides to prosecute.<sup>37</sup> The conflict between state and federal authorities has created uncertainty for states and cities who believe SIFs are an effective means of regulating for the health, safety, and welfare of the public. Since any legislation authorizing a SIF would be in contravention to federal criminal drug law, however, the issue ultimately comes down to whether the federal government will allow states to legislate despite federal law. In the meantime, this threat of prosecution may deter cities who lack the resources or appetite for a litigious dispute with the DOJ from taking steps to implement a SIF it believes is necessary.

This legislative game of chicken comes against the backdrop of a growing opioid epidemic throughout the United States. It is estimated that there are 586,000 Americans struggling with heroin abuse.<sup>38</sup> In a report analyzing drug overdose deaths between 2000 and 2014, the Centers for Disease Control and Prevention (CDC) found that overdose deaths increased by 137 percent, including a 200 percent increase in overdose deaths from opioids, with overdose deaths from heroin alone tripling, between 2010 and 2014.<sup>39</sup> Between 2010 and 2017, “[h]eroin-related

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<sup>34</sup> Complaint for Declaratory Judgment, at 6–7, *United States v. Safehouse*, No. 2:19-cv-00510-GAM, (E.D. Pa. Feb. 5, 2019), ECF No. 1.

<sup>35</sup> *United States v. Safehouse*, SAFEHOUSE, <https://www.safehousephilly.org/us-v-safehouse-filed-252019> [https://perma.cc/JQ8C-849E].

<sup>36</sup> Allen, *supra* note 31.

<sup>37</sup> Amanda Eisenberg, *New York Inches Closer to Supervised Injection Sites Despite Threat from Trump Administration*, POLITICO (Dec. 5, 2018, 5:18 PM EST), <https://www.politico.com/states/new-york/albany/story/2018/12/05/new-york-inches-closer-to-supervised-injection-sites-despite-threat-from-trump-administration-726216> [https://perma.cc/N3YQ-VT6H].

<sup>38</sup> See Scot Thomas, *Statistics on Drug Use*, AM. ADDICTION CTRS., <https://americanaddictioncenters.org/rehab-guide/addiction-statistics/> [https://perma.cc/9NQ3-XHR6].

<sup>39</sup> Rose A. Rudd, et al., *Increase in Drug and Opioid Overdose Deaths—United States, 2000–2014*, 64 MORBIDITY & MORTALITY WKLY. REP. 1378, 1378–79 (Jan. 1, 2016), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6450a3.htm> [https://perma.cc/DMW9-AVJK]; see also Rose A. Rudd, et al., *Increases in Drug and Opioid-Involved Overdose Deaths—United States, 2010–2015*, 65 MORBIDITY & MORTALITY WKLY. REP. 1445–54 (Dec. 16, 2016), [https://www.cdc.gov/mmwr/volumes/65/wr/mm655051e1.htm?s\\_cid=mm655051e1\\_w](https://www.cdc.gov/mmwr/volumes/65/wr/mm655051e1.htm?s_cid=mm655051e1_w) [https://perma.cc/PNQ6-F9LC] (updating the 2000–2014 study results, finding that heroin related deaths increased more than twenty percent between 2014 and 2015).

overdose deaths increased five-fold.”<sup>40</sup> With an estimated 70,000 overdose deaths, 2017 marked a record year for drug overdoses, claiming more lives than U.S. military casualties in the Vietnam War; approximately 47,000 of those deaths are attributable to heroin and synthetic opioids.<sup>41</sup> On October 26, 2017, President Donald Trump declared the opioid crisis a “public health emergency,” directing all federal agencies to use any emergency authority they have to reduce the number of opioid overdose deaths.<sup>42</sup> In November of 2017, the President’s Commission on Combating Drug Addiction and the Opioid Crisis<sup>43</sup> issued its report concluding that “without comprehensive action . . . the death count will continue to rise.”<sup>44</sup>

In light of this recent push for opioid policy reform, this note argues that SIFs are crucial to reducing heroin-related overdose deaths in America, where there are no operating SIFs. This note argues that it is not only necessary for the federal government to take an affirmative stance supporting SIFs, but that the federal government should allow states to establish SIFs either by creating an exception to the existing drug laws, or by adhering to a policy of noninterference with SIFs operating in accordance with applicable

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<sup>40</sup> *Heroin Overdose Data*, CDC (Dec. 19, 2018), <https://www.cdc.gov/drug-overdose/data/heroin.html> [https://perma.cc/Z6QX-HFDM].

<sup>41</sup> Josh Katz & Margot Sanger-Katz, ‘The Numbers Are Staggering.’ *Overdose Deaths Set a Record Last Year*, N.Y. TIMES: UPSHOT (Nov. 29, 2018), <https://www.nytimes.com/interactive/2018/11/29/upshot/fentanyl-drug-overdose-deaths.html> [https://perma.cc/VB83-L9FF]; German Lopez, *2017 Was the Worst Year Ever for Drug Overdose Deaths in America*, VOX (Aug. 16, 2018, 2:00 PM EDT), <https://www.vox.com/science-and-health/2018/8/16/17698204/opioid-epidemic-overdose-deaths-2017> [https://perma.cc/3R96-JT7D]; *Overdose Death Rates*, NAT’L INST. ON DRUG ABUSE, <https://www.drugabuse.gov/related-topics/trends-statistics/overdose-death-rates> [https://perma.cc/SN5Z-7HBE]; *Opioid Overdose: Drug Overdose Deaths*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 19, 2018), <https://www.cdc.gov/drugoverdose/data/statedeaths.html> [https://perma.cc/YD3W-XQCA] (opioid related overdose deaths account for more than sixty-seven percent of all drug overdose deaths).

<sup>42</sup> Louise Radnofsky & Jon Kamp, *Trump Announces Opioid Crisis a Public Health Emergency*, WALL ST. J. (Oct. 26, 2017 6:24 PM ET), <https://www.wsj.com/articles/president-trump-to-announce-opioid-crisis-a-public-health-emergency-1509024286> [https://perma.cc/T8GX-48T7].

<sup>43</sup> In March 2017, President Donald Trump signed an Executive Order “establishing [a] Commission on Combating Drug Addiction and the Opioid Crisis.” *President’s Commission on Combating Drug Addiction and the Opioid Crisis*, WHITE HOUSE (Oct. 25, 2017), <https://www.whitehouse.gov/ondcp/presidents-commission> [https://perma.cc/2ZNY-DWR5]. As President Trump stated, “This is an epidemic that knows no boundaries and shows no mercy, and we will show great compassion and resolve as we work together on this important issue.” *Id.* (internal quotation marks omitted). Former New Jersey Governor Chris Christie chaired the Commission and worked with the White House Office of Innovation to “stud[y] ways to combat and treat the scourge of drug abuse.” *Id.* The Commission was funded by the Office of National Drug Control Policy which cites opioid misuse, including heroin, as one of its “key issues.” *Office of National Drug Control Policy Key Issues*, WHITE HOUSE (Oct. 25, 2017), <https://www.whitehouse.gov/ondcp/key-issues> [https://perma.cc/622M-KU7L].

<sup>44</sup> PRESIDENT’S COMMISSION, *supra* note 1, at 5.



state law. As this note explains, the federal government should allow states to take the lead in implementing innovative drug reform policies as states are better able to administer policies targeted to particular demographics. Part I of this note explains the extent of illicit opioid abuse in the United States. Part II discusses the United States' statutory scheme for addressing illicit opioid use and the corresponding policy underpinnings. Part III reviews SIFs and the legal impediments to establishing SIFs in the United States. Finally, Part IV argues that the federal government should allow states to legislate for SIFs.

I. A CYCLE OF ABUSE: THE UNDERPINNINGS OF HEROIN ADDICTION IN THE UNITED STATES

A. *A History of Heroin Use in America*

1. Origins of the Opioid Crisis

Heroin was first produced and sold as a cough suppressant in 1898 and marketed as possessing many of the properties, but none of the dangers, of highly addictive morphine.<sup>45</sup> "Heroin addiction became a significant [United States] policy concern . . . in the 1950s and 1960s," as heroin-related deaths "increased . . . from 7.2 per 10,000 deaths to 35.8 per 10,000 deaths" between 1950 and 1961.<sup>46</sup> During this time, heroin addiction became a disproportionately bigger problem for black and Hispanic urban minorities.<sup>47</sup> In Chicago in 1957, black addicts comprised seventy-seven percent of arrested heroin users, but only twenty percent of the City's population.<sup>48</sup> From a public perception standpoint, heroin addiction was viewed as "countercultural."<sup>49</sup>

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<sup>45</sup> See DAVID T. COURTWRIGHT, DARK PARADISE 85 (2001); Mark Parts, *Disease Prevention as Drug Policy: A Historical Perspective on the Case for Legal Access to Sterile Syringes as a Means of Reducing Drug-Related Harm*, 24 FORDHAM URB. L.J. 475, 476 (1997).

<sup>46</sup> See Alan Gordon & Alexandra A. Gordon, *Does it Fit? A Look at Addiction, Buprenorphine, and the Legislation Trying to Make It Work*, 12 J. HEALTH & BIOMED. L. 1, 3–4 (2016).

<sup>47</sup> See COURTWRIGHT, *supra* note 45, at 150.

<sup>48</sup> *Id.* During this time heroin use was predominately concentrated to urban areas. See *id.* at 87. In New York City for instance, the leading cause of young adult mortality was heroin overdose. See Gordon & Gordon, *supra* note 46, at 4.

<sup>49</sup> See *id.* at 152.

## 2. The Drug Wars

By the 1970s, heroin addiction was no longer isolated to urban minorities, but spiked across all demographics.<sup>50</sup> Public perception of heroin declined as newspapers reported that soldiers in Vietnam were addicted to heroin, inciting domestic fears that soldiers would return home as addicts.<sup>51</sup> The drug issue garnered increased political significance as drug use was linked to increased crime.<sup>52</sup> President Nixon, after taking office in 1969, stated that “narcotic addiction had ceased to be a class problem and had become a universal one.”<sup>53</sup> In a 1972 speech, President Nixon declared a “war on drugs,” calling drug abuse “public enemy number one.”<sup>54</sup> President Nixon’s policy, while emphasizing treatment for drug addiction on one hand, instituted a comprehensive regulatory scheme that established a federal policy prohibiting the “recreational market for all mind altering substances.”<sup>55</sup>

Enthusiasm for the drug war hit its peak in the late 1980s.<sup>56</sup> A 1989 poll showed that six in ten Americans believed drug abuse was “the most important problem facing [the] country.”<sup>57</sup> In New York City, the number of heroin users increased “from 172,000 in 1980 to 198,000 in 1985.”<sup>58</sup> By 1986, however, drug users in New York City were shifting away from heroin, as the heroin addicts of the 1970s grew older and sought treatment, and newer users sought “crack” cocaine as their new drug of choice.<sup>59</sup>

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<sup>50</sup> See *id.* at 151–52. Some statistics “estimated that the number of heroin addicts [rose] from 315,000 in late 1969 to 560,000 at the end of 1971.” *Id.* at 169.

<sup>51</sup> *Soldiers, Hippies, and Richard Nixon—An American History of Methadone*, CRC HEALTH GRP., [https://www.crchealth.com/addiction/heroin-addiction-treatment/heroin-detox/history\\_methadone/](https://www.crchealth.com/addiction/heroin-addiction-treatment/heroin-detox/history_methadone/) [<https://perma.cc/Z3BD-V7TE>].

<sup>52</sup> See Alex Kreit, *Drug Truce*, 77 OHIO ST. L.J. 1323, 1328–29 (2016).

<sup>53</sup> See COURTWRIGHT, *supra* note 45, at 170.

<sup>54</sup> See Kreit, *supra* note 52, at 1329 (quoting MICHAEL MASSING, *THE FIX* 112 (1998)).

<sup>55</sup> *Id.* at 1330–31 (describing the Controlled Substances Act); see *infra* Section II.A.1.

<sup>56</sup> Thomas B. Rosenstiel, *63% Call Drugs Nation’s Biggest Problem: Poll Finds Concern Soaring; Heavy Media Coverage Seen as Factor*, L.A. TIMES (Sept. 14, 1989), [http://articles.latimes.com/1989-09-14/news/mn-278\\_1\\_drug-abuse](http://articles.latimes.com/1989-09-14/news/mn-278_1_drug-abuse) [<https://perma.cc/59K8-2DA6>].

<sup>57</sup> *Id.* (internal quotation marks omitted).

<sup>58</sup> See Peter Kerr, *Growth in Heroin Use Ending as City Users Turn to Crack*, N.Y. TIMES (Sept. 13, 1986), <http://www.nytimes.com/1986/09/13/nyregion/growth-in-heroin-use-ending-as-city-users-turn-to-crack.html> [<https://perma.cc/6AQD-7X2L>].

<sup>59</sup> See *id.* As one New York City user aptly put it, “Crack, that’s what it’s all about.” *Id.*

### 3. The Current Crisis

By the 1990s, the political fervor of the drug war “faded into the political background”<sup>60</sup> but the heroin epidemic did not.<sup>61</sup> Today, it is estimated that opioid-related overdoses kill one hundred and seventy-five people per day.<sup>62</sup> In 2016, the CDC reported dramatic increases in opioid-related deaths in the United States between 2000 and 2014.<sup>63</sup> The report concluded that the “United States [was] experiencing an epidemic of drug overdose . . . deaths.”<sup>64</sup> The report found that more people died from drug overdoses in 2014 than any other year on record.<sup>65</sup> The CDC cited that sixty-one percent of the drug overdoses involved some sort of opioid like heroin.<sup>66</sup> The report found that heroin overdoses “more than tripled” in the four years prior to the report,<sup>67</sup> which capped off a fifteen year surge in opioid-related overdoses.<sup>68</sup> The dramatic increase in opioid abuse is also being driven by an insufficient number of treatment centers, which have not expanded in proportion to the growing opioid crisis.<sup>69</sup> Based on these statistics, the CDC concluded “that the opioid epidemic is worsening,” and stressed the “need for continued action to prevent opioid abuse, dependence, and death, improve[d] treatment capacity for opioid use disorders, and reduce[d] . . . supply of illicit opioids, particularly heroin and illicit fentanyl.”<sup>70</sup> The CDC’s conclusions have had policy

<sup>60</sup> Kreit, *supra* note 52, at 1334.

<sup>61</sup> Federal spending on illegal drugs, for example, has stayed at approximately one hundred billion dollars per year since 2000. Jonathan P. Caulkins & Peter Reuter, *Dealing More Effectively and Humanely with Illegal Drugs*, 46 CRIME & JUST. 95, 96 (2017).

<sup>62</sup> PRESIDENT’S COMMISSION, *supra* note 1, at 6.

<sup>63</sup> See Rudd et al., *supra* note 39, at 1378.

<sup>64</sup> *Id.* at 1378.

<sup>65</sup> *Id.* at 1379 (finding nearly half a million deaths from overdose between 2000 and 2014). The report found that “there were approximately one and a half times more” deaths from drug overdose than from vehicle crashes. *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* This is in part caused by the use of fentanyl, a synthetic opioid with fifty to one-hundred times the strength of heroin being “used to adulterate heroin . . . and other ‘street drugs.’” *Opioid Facts*, DEPT OF JUSTICE, <https://www.justice.gov/opioid/awareness/opioid-facts> [<https://perma.cc/6S4L-5BUB>]. Overdose deaths often result when a user unknowingly purchases and uses fentanyl believing they are using heroin. *Id.*

<sup>68</sup> Rudd et al., *supra* note 39, at 1379; see also PRESIDENT’S COMMISSION, *supra* note 1, at 19 (finding that the “current [opioid] crisis is . . . fueled by . . . the advent of large-scale production and distribution of . . . orally effective . . . opioids; the widespread availability of inexpensive and purer illicit heroin; [introduction] of highly potent fentanyl . . . ; and the production of illicit opioid pills containing . . . fentanyl.”).

<sup>69</sup> See PRESIDENT’S COMMISSION, *supra* note 1, at 23. Eighty-five percent of all United States counties do not have opioid treatment programs that provide medication approved for opioid treatment, and thirty-eight percent of U.S. counties have no treatment centers for any substance abuse disorders. *Id.* at 32.

<sup>70</sup> Rudd et al., *supra* note 39, at 1378.

implications, including the Trump administration's declaration of the opioid crisis as a "public health emergency."<sup>71</sup>

The federal law enforcement response to the CDC's conclusions has been largely punitive, including "increased penalties for the use and sale of opioids" and "prosecutions . . . for accidental 'drug-induced' homicides," yet with little evidence that these approaches are helping reduce the number of overdose deaths.<sup>72</sup> Where in the past the opioid epidemic was primarily concentrated to African American people in inner cities, the current opioid crisis disproportionately affects middle class suburban white people.<sup>73</sup> As the vast majority of non-metropolitan counties in the United States do not have treatment centers that offer opioid treatment, this crisis is likely to become worse if no action is taken.<sup>74</sup>

### B. *Heroin and the Hypodermic Needle*

Injection opioid users are particularly susceptible to overdose and death. Drugs have a long history of being associated with hypodermic needles dating back to the invention of the hypodermic needle in the mid-1800s.<sup>75</sup> Injection with hypodermic needles is the most popular method of administration for heroin users as injection gives rise to intense pleasure without requiring the drug to first be broken down by digestion.<sup>76</sup> Studies suggest that there are approximately 1.5 million injection heroin users in the United States.<sup>77</sup> Injection drug use is undoubtedly dangerous;<sup>78</sup> users are at high risk of contracting life-threatening health problems like hepatitis or HIV/AIDS and use of unsterile needles can also cause bacterial

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<sup>71</sup> Radnofsky & Kamp, *supra* note 42. The opioid crisis has also had important economic implications: "Fatal overdose costs related to healthcare and lost productivity [are] estimated at \$21.5 billion. . . . [with] [a]pproximately [twenty-five percent] of the economic burden . . . borne by" publicly funded programs like Medicaid and Medicare. PRESIDENT'S COMMISSION, *supra* note 1, at 31.

<sup>72</sup> See Ethan Nadelmann & Lindsay LaSalle, *Two Steps Forward and One Step Back: Current Harm Reduction Policy and Politics in the United States*, 14 HARM REDUCTION J. 1, 3 (2017). The economic impact of these "[c]riminal justice-related costs were estimated at \$7.7 billion" between state and local governments. PRESIDENT'S COMMISSION, *supra* note 1, at 31.

<sup>73</sup> See Nadelmann & LaSalle, *supra* note 72, at 3.

<sup>74</sup> See PRESIDENT'S COMMISSION, *supra* note 1, at 33.

<sup>75</sup> See Parts, *supra* note 45, at 488.

<sup>76</sup> See Anil Aggrawal, *Opium: The King of Narcotics*, NARCOTIC DRUGS 110 (1995), <http://opioids.com/narcotic-drugs/chapter-3.html> [<https://perma.cc/T46T-E3BR>].

<sup>77</sup> See Parts, *supra* note 45, at 476–77.

<sup>78</sup> See Scott Burris et al., *Federalism, Policy Learning, and Local Innovation in Public Health: The Case of the Supervised Injection Facility*, 53 ST. LOUIS U. L.J. 1089, 1096 (2009).

infections like endocarditis.<sup>79</sup> Street-based intravenous drug users are at the highest risk of overdose and infection.<sup>80</sup>

Injection drug use has broader impacts on the community at large, as well, as community residents are subjected to the presence of used, discarded needles and intoxicated individuals who populate the streets after injecting in public.<sup>81</sup> Public injection drug users also burden emergency medical professionals.<sup>82</sup> In the Kensington neighborhood of Philadelphia, the largest open air heroin market on the east coast, for example, “dozens of homeless addicts” live under bridges and openly use drugs on streets that are cluttered with trash and needles.<sup>83</sup> Theft and safety are issues for non-drug users who live in the area—some Kensington residents admit that they are “afraid to go outside.”<sup>84</sup> Since state and city officials regard these deplorable conditions as part of a public health emergency, Philadelphia government officials are taking steps to implement a solution: establishing the city’s first SIF in Kensington.<sup>85</sup>

### C. *The Heroin Stigma*

The negative misconceptions that surround drug use and addiction also carry detrimental consequences, particularly for those users who feel too ashamed to ask for help.<sup>86</sup> Introduction to opioids often begins with prescription opioids, such as Vicodin, Percocet, or oxycodone.<sup>87</sup> Opioid use can be a steep and slippery

<sup>79</sup> *Id.* at 1096–97 (describing injection drug use as causing “a third of [the United States] cumulative AIDS cases”); PRESIDENT’S COMMISSION, *supra* note 1, at 30.

<sup>80</sup> See Ian Malkin, *Establishing Supervised Injecting Facilities: A Responsible Way to Help Minimise Harm*, 25 MELBOURNE U. L.R. 680, 683 (2001). “[M]ost studies suggest that at least one-third of the homeless [population] have substance abuse problems.” David Boyum & Peter Reuter, *Reflections on Drug Policy and Social Policy in DRUG ADDICTION AND DRUG POLICY: THE STRUGGLE TO CONTROL DEPENDENCE* 239, 241 (Philip B. Heymann & William N. Brownsberger, eds., 2001) [hereinafter *Reflections on Drug Policy and Social Policy*].

<sup>81</sup> Burris et al., *supra* note 78, at 1097.

<sup>82</sup> *Id.*

<sup>83</sup> Jennifer Percy, *Trapped by the ‘Walmart of Heroin’*, N.Y. TIMES (Oct. 10, 2018), <https://www.nytimes.com/2018/10/10/magazine/kensington-heroin-opioid-philadelphia.html> [https://perma.cc/9T53-2H53].

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*; Aubrey Whelan, *Here’s How Safehouse, Philly’s Proposed Safe-Injection Site Will Operate*, PHILA., INQUIRER (Oct. 8, 2018), <http://www.philly.com/philly/health/addiction/safe-injection-site-philadelphia-safehouse-faq-20181008.html> [https://perma.cc/285A-7K9Y].

<sup>86</sup> See *How Do We Stop the Social Stigma Towards Opiate Addiction*, MEDMARK (May 2, 2018), <https://medmark.com/how-do-we-stop-the-social-stigma-towards-opiate-addiction/> [https://perma.cc/M79E-YNKK].

<sup>87</sup> See Andrew Rosenblum, et al., *Opioids and Treatment for Common Pain: Controversies, Current Status, and Future Directions*, 16 EXPERIMENTAL & CLINICAL PSYCHOPHARMACOLOGY 405 (2008). These prescription opioids can be obtained legitimately by prescription by a primary care physician. See Gordon & Gordon, *supra* note 46, at 5. “[A]pproximately [eighty percent] of heroin users are estimated to have

slope to addiction because users often become physically dependent on the drug before there is any indication that they are experiencing negative consequences.<sup>88</sup> Once a dependence starts,<sup>89</sup> and a user begins to experience withdrawal from the opioids,<sup>90</sup> the user becomes “trapped in a vicious cycle of pursuing access to narcotics through nontraditional means,” leading many users to turn to heroin as a cheaper and more potent alternative to prescription opioids.<sup>91</sup>

While drug treatment centers may be effective in targeting opioid dependence, users have to choose to seek treatment first.<sup>92</sup> The decision to seek treatment may be stymied, however, by societal perceptions of those addicted to opioids.<sup>93</sup> Historically, the United States has viewed illegal drug use with an air of “moralistic condemnation” rather than as a health issue.<sup>94</sup> Substance abuse has been symbolically linked to poverty, mental illness, and stigmatized health conditions like HIV/AIDS.<sup>95</sup> The

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transitioned [to heroin] from misuse of prescription opioids.” PRESIDENT’S COMMISSION, *supra* note 1, at 28.

<sup>88</sup> See Gordon & Gordon, *supra* note 46, at 6.

<sup>89</sup> Whether or how soon a user develops a dependence varies based on the individual—“users who medicate for longer [time] period[s] are more prone to dependence and tolerance.” See *id.* at 6 n.37 (citing Lisa Esposito, *Silent Epidemic: Seniors and Addiction*, U.S. NEWS (Dec. 2, 2015, 9:00 AM), <http://health.usnews.com/health-news/patient-advice/articles/2015/12/02/silent-epidemic-seniors-and-addiction> [<http://perma.cc/7BKG-UJKV>]).

<sup>90</sup> Withdrawal from opioids has been described as “flu-like,” including muscle aches, runny nose, restlessness, lacrimation, and excessive sweating. See Christine Case-Lo, *Withdrawing from Opiates and Opioids*, HEALTHLINE (Oct. 25, 2017), <http://www.healthline.com/health/opiate-withdrawal#Symptoms3> [<https://perma.cc/4WJB-CKSJ>]. For heroin users, these symptoms lack the impression of having any end. See Gordon & Gordon, *supra* 46, at 24.

<sup>91</sup> Gordon & Gordon, *supra* note 46, at 7 (describing this as frequently illegal means such as heroin or synthetic fentanyl); see also Zach Lieberman and Leslye Davis, *Heroin Addiction Explained, How Heroin Hijacks the Brain*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/interactive/2018/us/addiction-heroin-opioids.html> [<https://perma.cc/4A83-2PXR>]. One user described that his path to heroin addiction began first with an addiction to oxycodone after being injured by an improvised explosive device (I.E.D.) while deployed in Iraq; he later learned to shoot up heroin as a cheaper alternative oxycodone. Percy, *supra* note 83. Another user described becoming addicted to opioids after being prescribed OxyContin, Percocet, and fentanyl patches after having neck surgery; she later overdosed in public whereupon onlookers reordered her overdose and shared the video with news outlets like CNN and Fox News. See Katherine Q. Seelye, et al., *How Do You Recover After Millions Have Watched You Overdose?*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/us/overdoses-youtube-opioids-drugs.html> [<https://perma.cc/TW9G-JD5N>].

<sup>92</sup> Burris et al., *supra* note 78, at 1099.

<sup>93</sup> See James D. Livingston et al., *The Effectiveness of Interventions for Reducing Stigma Related to Substance Use Disorders: A Systematic Review*, 107 ADDICTION 39, 40 (2012) (“Using particular substances . . . has not only been deemed deserving of social disapproval and moral condemnation, but society has also defined such behaviors as crimes.”).

<sup>94</sup> Don C. Des Jarlais, *Harm Reduction in the USA: The Research Perspective and an Archive to David Purchase*, 14 HARM REDUCTION J., 1, 2 (2017); see also Livingston et al., *supra* note 93, at 40.

<sup>95</sup> See Livingston et al., *supra* note 93, at 40. Relative to the general population, there is a high prevalence of drug abuse among homeless, poverty stricken, and

combination of moralistic intolerance of illicit drug use and stigmatization of certain groups has led to the demonization of illicit drug users.<sup>96</sup> These negative stereotypes are exacerbated by the criminalization of illicit drugs.<sup>97</sup> This stigma increases social alienation for drug users and can have negative consequences as users try to avoid the attachment of the stigma.<sup>98</sup> This culture-related stigma and “lack of culturally congruent addiction providers are unique barriers to . . . treatment.”<sup>99</sup> Because the stigma related to illicit drug use deters many from seeking treatment, there must be a new approach in order to effectively tackle this national health issue.

## II. A CYCLE OF ABUSE: THE CURRENT UNITED STATES STATUTORY FRAMEWORK AND DRUG POLICIES

Both state and federal governments have enacted laws to regulate illicit drug use. The Harrison Narcotics Act of 1914 (the Harrison Act) was the first major federal legislation to regulate opioids.<sup>100</sup> In effect, the Harrison Act, which was enacted to eliminate the illegal supply of opioids,<sup>101</sup> exacerbated the very problem it was attempting to solve by inadvertently creating a black market for opioids.<sup>102</sup> Commentators at the time argued that the Harrison Act was not only useless and expensive, but cruelly applied.<sup>103</sup> Thereafter, however, Congress continued to pass federal laws aimed at stifling opioid abuse.<sup>104</sup> Not only were these laws

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unemployed populations. See *Reflections on Drug Policy and Social Policy*, *supra* note 80, at 239–41; see also Des Jarlais, *supra* note 94, at 2 (explaining that in New York City in the 1980s HIV prevalence among injection drug users was as high as fifty percent).

<sup>96</sup> Des Jarlais, *supra* note 94, at 2.

<sup>97</sup> See Livingston et al., *supra* note 93, at 40 (citing several studies that identified “stigma as a significant barrier” to substance abuse treatment).

<sup>98</sup> See *id.* at 40–41.

<sup>99</sup> PRESIDENT’S COMMISSION, *supra* note 1, at 26.

<sup>100</sup> See Harrison Narcotics Tax Act of 1914, ch. 1, § 2, 38 Stat. 785, 786.

<sup>101</sup> See *id.* (the Act made it a crime “for any person to sell, barter, exchange, or give away, any [opium or coca leaf-derived] drugs except in pursuance of a written order . . . on a form to be issued . . . by the Commissioner of the Internal Revenue.”). The Harrison Act was interpreted to mean that opioids could not be prescribed to treat addiction, as “addiction” was determined not to be a disease a medical professional could treat “in the course of . . . professional practice.” Kasey C. Phillips, *Drug War Madness: A Call for Consistency Amidst the Conflict*, 13 CHAP. L. REV. 645, 653 (2010).

<sup>102</sup> See Phillips, *supra* note 101, at 653.

<sup>103</sup> See *id.* (citing AUGUST VOLLMER, *THE POLICE AND MODERN SOCIETY* 117–18 (McGrath Publishing 1969)). Vollmer, a former police chief, argued that drug addiction was a medical problem rather than a law enforcement problem. See *id.* at 655 n.79. Other critics argued that imprisoning addicts is tantamount to cruel and unusual punishment, since the state is essentially locking up a person for contracting a disease. See A.R. Lindesmith, “Dope Fiend” Mythology, 31 J. CRIM. L. & CRIMINOLOGY 199, 207–08 (July–Aug. 1940).

<sup>104</sup> For example, in 1930 Congress created the Federal Bureau of Narcotics to preside over the enforcement of opioid laws. See Phillips, *supra* note 101, at 654. In 1956 Congress passed the Narcotic Control Act “which increased penalties for drug law

arguably usurping the states' power to regulate for the welfare of their people, but the addictive might of opioids continued to render federal legislation ineffective.<sup>105</sup>

## A. Federal Legislative Scheme

### 1. Federal Laws Targeting Drug Use

In 1969 President Nixon drafted a message to Congress urging that a national drug policy was necessary, calling the older laws “inadequate and outdated.”<sup>106</sup> In response, Congress enacted the Controlled Substances Act (CSA) as part of the larger Comprehensive Drug Abuse Prevention and Control Act in 1970.<sup>107</sup> The CSA created five schedules of controlled substances along with corresponding penalties.<sup>108</sup> Heroin is a schedule I

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violations,” allowed law enforcement officers to arrest suspected drug law violators without a warrant, and required convicted drug offenders to acquire special certification to enter and leave the United States. *See id.* at 655.

<sup>105</sup> *See* COURTWRIGHT, *supra* note 45, at 152.

<sup>106</sup> *See* Richard Nixon, President of the United States, Special Message to Congress on Control of Narcotics and Dangerous Drugs (July 14, 1969), USCB PRESIDENCY, <https://www.presidency.ucsb.edu/documents/special-message-the-congress-control-narcotics-and-dangerous-drugs> [<https://perma.cc/6JT4-QR2Z>] (“A national awareness of the gravity of the situation is needed; a new urgency and concerted national policy are needed at the Federal level to begin to cope with the growing menace to the general welfare of the United States. . . . To more effectively meet the narcotic and dangerous drug problems at the Federal level, the Attorney General is forwarding to the Congress a comprehensive legislative proposal to control these drugs. This measure will place in a single statute, a revised and modern plan for control.”). In the message, President Nixon called for a model based on state legislation, international cooperation, suppression of illegal importation, suppression of national trafficking, training programs for addicts, and more effective training for law enforcement officers. *See id.*

<sup>107</sup> Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. §§ 801–971 (2012)). In § 801, Congress stated its findings: “Federal control of intrastate incidents of the traffic in controlled substances is essential to the effective control of interstate incidents of such traffic.” Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1236, 1242 (codified in 21 U.S.C. § 801) (the CSA was enacted to “increase[] research into, and prevention of, drug abuse and drug dependence; to provide for treatment, and rehabilitation of drug abusers and drug dependent persons; and to strengthen existing law enforcement authority in the field of drug abuse.”); *see also* COURTWRIGHT, *supra* note 45, at 163 (the CSA replaced all federal legislation that had previously been in place). Congress also enacted Reorganization Plan No. 2 of 1973 which created the Drug Enforcement Agency (DEA). Pub. L. No. 93-235, sec. 4, 87 Stat. 1091, 1092. The DEA is responsible for enforcing the CSA. *See DEA History*, DRUG ENF’T ADMIN., <https://www.dea.gov/about/history.shtml> [<https://perma.cc/QAT2-LHNV>]; *see also* LISA N. SACCO, CONG. RESEARCH SERV., R43749, DRUG ENFORCEMENT IN THE UNITED STATES: HISTORY, POLICY, AND TRENDS 6–7, 16 (2014) (In establishing the DEA, President Nixon stressed the goal of having the DEA “provide a single focal point for coordinating Federal drug enforcement efforts with those of State and local authorities, as well as . . . maximiz[ing] coordination between Federal investigation and prosecution efforts.” The majority of drug arrests, however, are made by state and local law enforcement).

<sup>108</sup> *See* Controlled Substances Act, § 202 (codified as amended at 21 U.S.C. § 812 (2012)). The schedules of drugs were classified according to dangerousness, potential for abuse, and medicinal value. U.S. DEPT OF JUST., OFFICE OF THE INSPECTOR GEN., AUDIT



substance.<sup>109</sup> Subject to narrow exceptions, the CSA makes it a crime to possess any schedule I drug.<sup>110</sup> The CSA, in the so-called “Crack House Statute,” also makes it a felony to knowingly maintain any place for using prohibited substances.<sup>111</sup>

“Over the last decade, the United States has . . . shifted its stated drug policy toward a more comprehensive approach . . . that focuses on prevention, treatment, and enforcement.”<sup>112</sup> In 2016, President Barack Obama signed the Comprehensive Addiction and Recovery Act (CARA) into law, the most comprehensive legislation passed since the CSA itself.<sup>113</sup> CARA authorized \$181 million dollars to be spent each year to combat the opioid epidemic by

REPORT 97-31A, SUPPLEMENTAL FINANCIAL AND MANAGEMENT INFORMATION: DEA HISTORY, <https://oig.justice.gov/reports/DEA/a9731a/a9731ap5.htm> [<https://perma.cc/MBA3-N25P>]. Schedule I drugs include heroin, THC, and hallucinogens like LSD. *See* Agriculture Improvement Act of 2018, Pub. L. No. 115-391, sec. 12619, § 202(c), 132 Stat. 4490, 5018 (to be codified at 21 U.S.C. § 812 (2018)).

<sup>109</sup> 21 U.S.C. § 812(c)(1)(b)(10) (2012). Heroin was designated a schedule I drug, in part due to “a lack of accepted safety for use of the drug.” *Id.* § 812(b)(1)(C). Further, medicines that helped treat heroin addiction such as methadone, were given schedule II treatment because they were considered to have a “high potential for abuse, risk of severe psychological or physical dependence, and accepted medical use for treatment in the United States.” Gordon & Gordon, *supra* note 46, at 13; *see also* 21 U.S.C. § 812(c)(1)(b)(11). “Methadone is a narcotic used to treat narcotic addiction. It is commonly used to reduce withdrawal symptoms for those addicted to heroin . . .” Gordon & Gordon, *supra* note 46, at 13 n.63 (citing *U.S. National Library of Medicine, Methadone*, NAT’L INSTS. OF HEALTH, <https://medlineplus.gov/druginfo/meds/a682134.html#why> [<https://perma.cc/9ZL2-JA99>]). One of the Nixon administration’s major initiatives was creating “a federally subsidized drug treatment system built . . . around . . . methadone [treatments].” *See* DAVID BOYUM & PETER REUTER, AN ANALYTICAL ASSESSMENT OF U.S. DRUG POLICY 6 (2005) [hereinafter AN ANALYTICAL ASSESSMENT OF U.S. DRUG POLICY].

<sup>110</sup> *See* Lisa Scott, *The Pleasure Principle: A Critical Examination of Federal Scheduling of Controlled Substances*, 29 SW. U. L. REV. 447, 453 (2000). This included therapeutic usages, as therapeutic use of schedule I drugs was outlawed even for physicians. *See* COURTWRIGHT, *supra* note 45, at 163.

<sup>111</sup> *See* 21 U.S.C. § 856. The colloquial “Crack House Statute” comes from the legislative history, where one legislator stated the statute was created to “outlaw the operation of . . . so called ‘crack houses,’ where ‘crack,’ cocaine and other drugs [were] manufactured and used.” 132 CONG. REC. 26,474 (1986) (excerpt of Senate Amendment No. 3034 to H.R. 5484, 99th Cong. (1986)). The Crack House Statute makes it unlawful to “manage or control any place . . . and . . . make available for use . . . the place for the purpose or unlawfully manufacturing, storing, distributing, or using a controlled substance.” 21 U.S.C. § 856(a)(2). It is under this provision that the United States Attorney’s Office for the Eastern District of Pennsylvania brought a civil suit against an entity planning to open a SIF. *See supra* notes 33–35 and accompanying text.

<sup>112</sup> *See* SACCO, *supra* note 107, at 15. President Obama also changed the rhetoric around drug use from a criminal justice perspective to a treatment perspective, stating in a speech, “[W]e have viewed the problem of drug abuse generally in our society through the lens of the criminal justice system. . . . [T]he only way that we reduce demand is if we’re providing treatment and thinking about this as a public health problem, and not just a criminal problem.” Barack Obama, President of the United States, Remarks During a Panel Discussion at the National Prescription Drug Abuse and Heroin Summit in Atlanta, Georgia (Mar. 29, 2016), <http://www.presidency.ucsb.edu/ws/index.php?pid=115136> [<https://perma.cc/XZ9W-63JE>].

<sup>113</sup> Comprehensive Addiction and Recovery Act of 2016, Pub. L. No. 114-198, 130 Stat. 695 (2016).

advancing opioid treatment and intervention programs, in addition to increasing law enforcement access to naloxone.<sup>114</sup> Despite President Obama's declaration that "[t]he war on drugs has been an utter failure,"<sup>115</sup> most federal drug dollars continue to be spent on drug enforcement.<sup>116</sup> Drug-related cases currently represent the second highest category of cases filed by United States Attorneys' Offices.<sup>117</sup> Overall, "the U[nited] S[tates'] drug policy is known for its [focus] on criminalization."<sup>118</sup> The criminal justice response to distribution and possession of drugs have cost American taxpayer millions of dollars, incarcerated millions of individuals, marginalized poor minority communities, and yet, have done little to decrease drug use.<sup>119</sup> Consequently, a new strategy is needed to save the hundreds of lives that are lost every day to opioid abuse.

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<sup>114</sup> See Comprehensive Addiction and Recovery Act of 2016, Pub. L. No. 114-198, 130 Stat. 759 (2016); *Comprehensive Addiction and Recovery Act (CARA)*, CMTY. ANTI-DRUG COALS. OF AM. <https://www.cadca.org/comprehensive-addiction-and-recovery-act-cara> [https://perma.cc/RV57-K8BJ].

<sup>115</sup> Bernd Debusmann, *Obama and the Failed War on Drugs*, REUTERS (Apr. 16, 2012, 1:55 PM), <https://www.reuters.com/article/us-column-debusmann-drugs/obama-and-the-failed-war-on-drugs-bernd-debusmann-idUSBRE83F0ZR20120416> [https://perma.cc/BC8F-CR43].

<sup>116</sup> See SACCO, *supra* note 107, at 15 ("[A]pproximately [sixty percent] of all federal drug control spending is dedicated to [reducing drug supply]," and "[thirty-seven percent] of the total drug control budget" is allocated to "domestic law enforcement.").

<sup>117</sup> See SACCO, *supra* note 107, at 24.

<sup>118</sup> See Jessica G. Katz, Note, *Heroin Maintenance Treatment: Its Effectiveness and the Legislative Changes Necessary to Implement It in the U.S.*, 26 J. CONTEMP. HEALTH L. & POL'Y 300, 318 (2010). As of February 2017, seventy-nine percent of inmates in federal prisons suffer from drug addiction or mental illness and forty percent of inmates suffer from both. JAMES AUSTIN, ET AL., BRENNAN CTR. FOR JUST. A GUIDELINES PROPOSAL: HOW MANY AMERICANS ARE UNNECESSARILY INCARCERATED? 8 (2017). Prisons are ill-equipped to treat drug addiction, and prison alternatives like treatment centers are suggested as a "more effective sanction[]" for convicted drug users, especially since few states and federal prisons allow for medication to treat opioid addiction. *Id.* at 8, 11–13; Nadelmann & LaSalle, *supra* note 72, at 2.

<sup>119</sup> Don Stemen, *Beyond the War: The Evolving Nature of the U.S. Approach to Drugs*, 11 HARV. L. & POL'Y REV. 375, 381 (2017). The CSA increased the maximum sentences for offenses involving Schedule I and II substances, and the 1986 Anti-Drug Abuse Act created a series of mandatory sentences for drug offenses. *Id.* at 391. Between 1978 and 2010 the number of individuals convicted of a drug offense increased 550 percent, from 4,000 individuals to 26,000 individuals *Id.* at 398–99 (citing Sourcebook of Criminal Justice Statistics Online, Table 5.38.2010, <http://www.albany.edu/sourcebook/pdf/t5382010.pdf> [https://perma.cc/CTY2-R25D]). Between 1980 and 2014, the population of inmates in federal prisons for drug offenses increased 1,869 percent, from 4,400 people to 96,500 people. *Id.* at 400. As of November 2018, there were 77,649 individuals serving a federal prison sentence for a drug offense. *Offenses*, FED. BUREAU OF PRISONS, [https://www.bop.gov/about/statistics/statistics\\_inmate\\_offenses.jsp](https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp) [https://perma.cc/GG4A-TWQC]. Drug arrests and convictions have disproportionately affected "African American communities more than any other racial or ethnic groups." Stemen, *supra* note 119, at 400–01. "African-Americans represent just 12.5 [percent] of illicit drug users, but . . . [thirty-three percent] of those incarcerated in state facilities for drug offenses." *Criminal Justice Fact Sheet*, NAACP, <https://www.naACP.org/criminal-justice-fact-sheet/> [https://perma.cc/B3UR-6WKV]. Thirty-nine percent of drug offenders in federal prison are African-American. SAM TAXY, ET AL., BUREAU OF JUSTICE STATISTICS, NCJ 248648, DRUG

## 2. Federal Drug Laws in a System of Federalism

### *a. Dual Sovereignty and State Legislative Power*

Generally, federal statutes, including the CSA, are the “supreme law of the land.”<sup>120</sup> Sometimes, however, states will enact legislation permitting individuals to engage in behavior outlawed by federal law. The United States is a federal system whereby, “[t]he powers delegated by the . . . Constitution to the federal government are few and defined.”<sup>121</sup> Pursuant to its enumerated powers, the federal government may create federal law that is applicable to the states. This “bedrock principle” of federalism “ensures that states retain the power to legislate areas outside the scope of [the federal government’s] enumerated powers.”<sup>122</sup> In other words, the Constitution creates a federal government of enumerated powers and reserves those powers not delegated to the federal government to the states. Implicit in this constitutional scheme is a system of dual sovereignty “in which authority is housed at both the state and federal levels”<sup>123</sup>—as the United States Supreme Court has stated, “[i]t is incontestable that the Constitution established a system of ‘dual sovereignty.’”<sup>124</sup>

Unlike the federal government, whose actions are constrained to explicit constitutional grants of power, state legislatures have power to “deal[] with the whole gamut of problems cast up out of the flux of everyday life in the state[s].”<sup>125</sup> Despite this broad statutory and regulatory power, “state law [is

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OFFENDERS IN FEDERAL PRISON: ESTIMATES OF CHARACTERISTICS BASED ON LINKED DATA 3 (2015), <https://www.bjs.gov/content/pub/pdf/dofp12.pdf> [<https://perma.cc/5VLG-V68P>].

<sup>120</sup> See *McCulloch v. Maryland*, 17 U.S. 316, 406 (1819) (citing U.S. CONST. art. VI, cl. 2). Some exceptions include the United States Constitution and Treaties with Foreign Nations. See, e.g., *Missouri v. Holland*, 252 U.S. 416, 432 (1920) (treaties made pursuant to the Constitution or federal statute are the supreme law of the land); *Marbury v. Madison*, 5 U.S. 137, 177–78 (1803) (the Constitution is the “fundamental and paramount law of the nation”).

<sup>121</sup> THE FEDERALIST NO. 45 (James Madison).

<sup>122</sup> Ira P. Robbins, *Guns N’ Ganja: How Federalism Criminalizes the Lawful Use of Marijuana*, 51 U.C. DAVIS L. REV. 1783, 1822 (2018).

<sup>123</sup> Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 541 (2007); see also *Printz v. United States*, 521 U.S. 898, 919 (1997).

<sup>124</sup> *Printz*, 521 U.S. at 918.

<sup>125</sup> Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 491 (1954). “The central source of state regulatory power . . . is the police power” which gives states power to legislate “in the service of the health, safety, and welfare of [its] citizenry.” Daniel B. Rodriguez, *The Inscrutable (Yet Irrepressible) State Police Power*, 9 N.Y.U. J.L & LIBERTY 662, 662 (2015). “The police power is commonly viewed as an essential power . . . that grows out of our constitutional tradition.” *Id.*

not] a grant of immunity from federal law”;<sup>126</sup> rather, Article VI of the U.S. Constitution, known as the Supremacy Clause, ensures that federal law will prevail against conflicting state law.<sup>127</sup> It does not follow, however, that states must enforce or implement federal law.<sup>128</sup> It remains “an essential attribute of the States’ retained sovereignty that they remain independent and autonomous within their proper sphere of authority.”<sup>129</sup> State sovereignty serves a vital role in our constitutional system: it allows each state to operate “quasi-independently” and “allows states to serve as laboratories, ‘try[ing] novel social and economic experiments without the risk to the rest of the country.’”<sup>130</sup> Given this dual system of sovereignty, it seems manifest that there are some policy areas where state and federal systems must work together to establish rules of conduct. Where the dual sovereigns fail to cooperate when necessary, however, confusion and uncertainty over what conduct is proscribed will ensue.<sup>131</sup>

Drug policy is one of these policy areas where state and federal systems should cooperate to establish a coherent and consistent policy. “[T]he CSA does not displace [state] authority . . . to regulate illicit drug use.”<sup>132</sup> Instead, each state has its own statutory framework to prohibit the possession, manufacture, and sale of illicit drugs.<sup>133</sup> It is under this statutory framework that ten states and the District of Columbia have legalized recreational marijuana, which is an illegal schedule I substance under the CSA.<sup>134</sup> Thus, it is under this statutory framework that states would be capable of establishing SIFs.

<sup>126</sup> Paul J. Larkin, Jr., *States’ Rights and Federal Wrongs: The Misguided Attempt to Label Marijuana Legalization Efforts as a “States’ Rights” Issue*, 16 GEO. J. L. & PUB POL’Y, 495, 501 (2018).

<sup>127</sup> See U.S. CONST. art. VI. cl. 2; Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?* 111, HARV. L. REV. 2181, 2196 (1998) (stating state and federal governments are not “dual” in the sense of “equal”); Larkin, *supra* note 126, at 501; Ryan, *supra* note 123, at 542.

<sup>128</sup> See *New York v. United States*, 505 U.S. 144, 188 (1992) (“Whatever the outer limits of [state] sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program.”); *Printz*, 521, U.S. at 933 (holding that states are not required to implement provisions of a federal gun regulation statute, as being forced to do so would be an unconstitutional “commandeering” of state resources through federal regulation).

<sup>129</sup> *Printz*, 521 U.S. at 928 (citing *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868)).

<sup>130</sup> Robbins, *supra* note 122, at 1786, 1822 (alteration in original) (quoting *Whalen v. Roe*, 429 U.S. 589, 591 n.20 (1977)).

<sup>131</sup> See *id.* at 1788.

<sup>132</sup> Burris et al., *supra* note 78, at 1113.

<sup>133</sup> *Drug Laws and Drug Crimes*, NOLO, <https://www.nolo.com/legal-encyclopedia/drug-laws-drug-crimes-32252.html> [<https://perma.cc/YLF6-PCXD>].

<sup>134</sup> See 21 U.S.C. § 812 (2012); *State Marijuana Laws in 2018 Map*, GOVERNING, <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html> [<https://perma.cc/WV5N-SHBS>].

*b. Federal Executive Branch Discretion*

The Constitution, which vests the executive power in the President of the United States, has authority over how federal laws are implemented.<sup>135</sup> This executive power makes it the president's role to "take Care that the Laws be faithfully executed."<sup>136</sup> The president thus has broad law enforcement responsibilities that includes authority to exercise prosecutorial discretion to "reflect [the] President's policy preferences."<sup>137</sup>

One such example of the role policy can play in prosecutorial decision making is the so-called Cole Memo. The Cole Memo, issued August 29, 2013 by United States Deputy Attorney General James M. Cole during the Obama presidency, provided "guidance to federal prosecutors concerning marijuana enforcement under the [CSA]."<sup>138</sup> The Cole Memo explained the DOJ's "enforcement priorities" regarding marijuana and stated that the DOJ would only seriously consider prosecuting marijuana violations when those priorities were at stake.<sup>139</sup> The effect of the Cole Memo was that, "[a]s long as states attempted to stop behavior that triggered the federal government's enforcement priorities,

<sup>135</sup> U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

<sup>136</sup> U.S. CONST. art. II, § 3.

<sup>137</sup> Henry L. Chambers, Jr., *The President, Prosecutorial Discretion, Obstruction of Justice, and Congress*, 52 U. RICH. L. REV. 609, 617 (2018). The discretion to determine whether federal resources will be used to prosecute violations of federal criminal law is part of "tak[ing] care that the law[s] [will be] faithfully executed," as there are insufficient resources to fully enforce every law. *Id.* at 613; *see also* United States v. Armstrong, 517 U.S. 456, 464 (1996).

<sup>138</sup> Memorandum of Guidance Regarding Marijuana Enforcement from James M. Cole, Deputy Att'y Gen. of the U.S., to All U.S. Att'ys 1 (Aug. 29, 2013) <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/VW4D-ATGR>] [hereinafter Cole Memo]. In 2018, President Trump's then-Attorney General Jeff Sessions withdrew the Cole Memo, stating that "[i]t is the mission of the Department of Justice to enforce the laws of the United States, and the previous issuance of guidance undermines the rule of law and the ability of our local, state, tribal, and federal law enforcement partners to carry out this mission." Press Release, U.S. Dep't of Justice, Justice Department Issues Memo on Marijuana Enforcement (Jan. 4, 2018), <https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement> [<https://perma.cc/F5MR-F4F6>]; *see also* Memorandum on Marijuana Enforcement from Jefferson B. Session, III, Att'y Gen. of the U.S., to All U.S. Att'ys (Jan. 4, 2018). More recently, President Trump's nominee to replace Mr. Sessions, William Barr, testified in his confirmation hearing before the U.S. Senate that, if confirmed as United States Attorney General, "he would 'not go after' marijuana companies in states where [marijuana] is legal." Associated Press, *Trump's AG Pick Vows Not to Target Marijuana Businesses*, N.Y. TIMES (Jan. 15, 2019), <https://www.nytimes.com/aponline/2019/01/15/us/politics/ap-us-attorney-general-marijuana.html> [<https://perma.cc/LG67-JLCN>].

<sup>139</sup> Cole Memo, *supra* note 138, at 1–2. The DOJ's priorities for enforcing the CSA against marijuana violations include, *inter alia*, "preventing the distribution of marijuana to minors," "preventing revenue from the sale of marijuana from going to criminal enterprises," and "preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use." *Id.* at 1–2.

state and local law enforcement would largely be left to address marijuana-related activity” as they wished.<sup>140</sup> The Cole Memo was precipitated by some states which passed laws allowing for marijuana use in certain circumstances.<sup>141</sup> Not only does the Cole Memo aptly illustrate the discretion the executive branch has over the implementation of federal drug laws, but it demonstrates that that same type of discretion could be exercised in the SIF context.

## B. *Drug Policies in the United States*

### 1. The Punitive Approach

Drug policy in the United States has been viewed as a debate over “whether drug abuse is best dealt with as a criminal or medical problem.”<sup>142</sup> In at least the last three decades, federal drug policy has focused on reducing the number of drug users through enforcement of existing drug laws.<sup>143</sup> This “[p]unitive drug prohibition” plan is based on “policies that rely on penal sanctions (incarceration) to punish those who use ‘illicit’ drugs.”<sup>144</sup> This rests on two primary assumptions: first, that an illicit drug-free society is attainable and second, “that ‘illicit drug use is morally wrong’ and thus should be criminalized.”<sup>145</sup> The United States has long condemned illicit drug use as immoral.<sup>146</sup> Proponents of a punitive drug policy “argue that criminal sanctions have a deterrent effect, prevent . . . crimes associated with drug use, and promote moral health.”<sup>147</sup>

This focus of creating a drug-free America has led to tougher drug laws that are often “harsh and inflexible.”<sup>148</sup> In

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<sup>140</sup> Chambers, *supra* note 137, at 619.

<sup>141</sup> *See id.* at 618.

<sup>142</sup> AN ANALYTICAL ASSESSMENT OF U.S. DRUG POLICY, *supra* note 109, at 12; *see also* Scott Burris, et al., *Stopping an Invisible Epidemic: Legal Issues in the Provision of Naloxone to Prevent Opioid Overdose*, 1 DREXEL L. REV. 273, 286 (2009) (explaining that supply reduction is focused on disrupting the black market, where demand reduction is focused on imposing “stiff[er] criminal penalties, public education campaigns, and mandatory drug testing.”).

<sup>143</sup> AN ANALYTICAL ASSESSMENT OF U.S. DRUG POLICY, *supra* note 109, at 10. As stated by the President George H.W. Bush’s Director of the U.S. Office of National Drug Control Policy, “[T]he highest priority of our drug policy must be a stubborn determination to further reduce the overall level of drug use nationwide—experimental first use, ‘casual’ use, regular use, and addiction alike.” *Id.* at 10–11 (alteration omitted).

<sup>144</sup> Melissa T. Aoyagi, Note, *Beyond Punitive Prohibition: Liberalizing the Dialogue on International Drug Policy*, 37 N.Y.U. J. INT’L & POL. 560, 560 (2005).

<sup>145</sup> *Id.* at 561 (quoting G. Alan Marlatt, *Basic Principles and Strategies of Harm Reduction*, in HARM REDUCTION: PRAGMATIC STRATEGIES FOR MANAGING HIGH-RISK BEHAVIORS 49, 49 (G. Alan Marlatt ed. 1998)).

<sup>146</sup> Des Jarlais, *supra* note 94, at 2.

<sup>147</sup> *See* Aoyagi, *supra* note 144, at 567 (footnotes omitted).

<sup>148</sup> *See* Kreit, *supra* note 52, at 1336.

addition to placing heavy fiscal burdens on state and federal governments, these punitive laws, which criminalized minor drug offenses and imposed mandatory minimum sentences for violators, have led to marginalization and “mass incarceration of drug users in federal and state prisons.”<sup>149</sup> What the punitive approach has not done, however, is reduce drug use or addiction in any significant way.<sup>150</sup> In light of the dramatic increases in overdose deaths in recent years, the United States should not continue to stand by a policy that has not only been demonstrably ineffective, but has actually been detrimental to American society.

## 2. The Harm Reduction Model of Drug Policy

Unlike the punitive approach, the harm reduction model “refer[s] to policies, programs, interventions or practices designed to minimize negative health and social consequence associated with drug use without requiring the cessation of drug use itself.”<sup>151</sup> Instead of focusing on the morality of drug use, harm reduction focuses on combatting the impacts that drug use has on both illicit drug users and society.<sup>152</sup> Harm reduction has two core components: “pragmatism” in “providing [effective] policies and services,” and “respect for the human rights” of drug users.<sup>153</sup> “An

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<sup>149</sup> See Aoyagi, *supra* note 144, at 564–66; see also *Reflections on Drug Policy and Social Policy*, *supra* note 80, at 243 (explaining how incarcerating large numbers of people in a community can have negative influences on the community, such as decreased marriage rates, increased number of single-parent homes, and less stable community composition); see also PRESIDENT’S COMMISSION, *supra* note 1, at 101–02 (A total of \$9.2 billion in resources was spent on domestic drug law enforcement for fiscal year 2018, including more than \$4.4 billion to “conduct activities associated with the incarceration and/or monitoring of drug-related offenders”).

<sup>150</sup> PEW CHARITABLE TRUSTS, MORE IMPRISONMENT DOES NOT REDUCE STATE DRUG PROBLEMS 5 (2018), [https://www.pewtrusts.org/-/media/assets/2018/03/pspp\\_more\\_imprisonment\\_does\\_not\\_reduce\\_state\\_drug\\_problems.pdf](https://www.pewtrusts.org/-/media/assets/2018/03/pspp_more_imprisonment_does_not_reduce_state_drug_problems.pdf) [<https://perma.cc/946B-7UR4>] (explaining the results of a study that compared state drug imprisonment rates to important measures of drug problems and found that there was “no statistically significant relationship” between the two, or “[i]n other words, higher rates of drug imprisonment did not translate into lower rates of drug use, arrests, or overdose deaths.”).

<sup>151</sup> Alana Klein, *Criminal Law and the Counter-Hegemonic Potential of Harm Reduction*, 38 DALHOUSIE L.J., 447, 449 (2015). Harm-reductionists believe that “public policy should address the realities of drug use.” Aoyagi, *supra* note 144, at 573.

<sup>152</sup> See Aoyagi, *supra* note 144, at 572. “The goal of harm reduction . . . is to keep individuals and communities safe and healthy by preventing infections, illness and injury related to drug use.” *Harm Reduction*, VANCOUVER COASTAL HEALTH, <http://www.vch.ca/public-health/harm-reduction> [<https://perma.cc/M6C7-CLPY>]. SEPs and SIFs are both examples of harm reduction policies. Klein, *supra* note 151, at 449. “Harm reduction services provide supplies for safer drug injection (needles), safer smoking (mouthpieces, push sticks), and safer sex (condoms).” *Harm Reduction*, *supra* note 152. Harm reduction services also offer “[e]ducation on safer drug use and . . . sex,” “referrals to health [and] addictions services,” “access to testing[,] and treatment for communicable diseases.” *Id.*

<sup>153</sup> Des Jarlais, *supra* note 94, at 5. Harm reduction rejects the assumption that drug use can be completely eliminated from society. See Aoyagi, *supra* note 144, at 573.

important part of [these two core components] is the destigmatization of drug users,” thus, the policies often focus on construing drug users as worthy members of society.<sup>154</sup> Harm reduction policies have been praised for their cost effectiveness and flexibility in responding to problems by “elevating pragmatism over prohibitionist ideology.”<sup>155</sup>

Critics of harm reduction policies argue that they imply tolerance, condonation, and promotion of drug use.<sup>156</sup> As one critic put it, “[i]t’s not everyone’s right to be stoned.”<sup>157</sup> Harm reduction, however, is the dominant philosophy outside of the United States,<sup>158</sup> and there is evidence that the United States may be ready to more openly embrace harm reduction policies in light of the growing heroin epidemic.<sup>159</sup> A 2017 report by The Johns Hopkins School of Public Health and The Clinton Foundation gave recommendations for combatting the opioid epidemic by citing expanded harm reduction strategies as one effective method for treating people with opioid addiction.<sup>160</sup> In 2015 President Obama issued a memorandum directing federal agencies to develop action plans addressing barriers to drug treatment; further, in 2018 the Trump administration stated that “expand[ing] access to evidence-based addiction treatment in every State” would be among the administration’s initiatives to stop opioid abuse.<sup>161</sup> If the Trump

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<sup>154</sup> Aoyagi, *supra* note 144, at 573; Klein, *supra* note 151, at 449; *see also* LANA D. HARRISON & JAMES A. INCIARDI, HARM REDUCTION: NATIONAL AND INTERNATIONAL PERSPECTIVES 50 (2000) (explaining that harm reduction “implies a respect for the choices people make,” even if those choices are unhealthy).

<sup>155</sup> Klein, *supra* note 151, at 449.

<sup>156</sup> HARRISON & INCIARDI, *supra* note 154, at 50.

<sup>157</sup> *Id.* (quoting Michael McCrimmon).

<sup>158</sup> *See* Nolan, *supra* note 16, at 31 (explaining that harm reduction is the basic philosophy in England, Scotland, Ireland, Australia, and Canada); *see* Katz, *supra* note 118, at 321 (the difference between European and American drug policies is explained by a difference in policy focuses—in the European nations, “policy focuses on drug addiction . . . as a public health concern, rather than a criminal issue” as in the United States).

<sup>159</sup> *See* Nadelmann & LaSalle, *supra* note 72, at 1. The United States does currently subscribe to some harm reduction drug policies—methadone maintenance treatments (a treatment that involves prescribing methadone, a synthetic opioid, to individuals addicted to opioids to alleviate the symptoms of opioid withdrawal), for example, have existed in the United States for more than forty years. *See* Herman Joseph, Sharon Stancliff, & John Langrod, *Methadone Maintenance Treatment (MMT): A Review of Historical and Clinical Issues*, 67 MOUNT SINAI J. MED. 347, 351 (2000); *Overview of Methadone Maintenance Treatment*, CTR. FOR ADDICTION & MENTAL HEALTH, <https://www.porticonetwork.ca/web/knowledgex-archive/amh-specialists/overview-mmt> [<https://perma.cc/S2TK-T7RQ>]. Another example is syringe exchange programs (SEPs) which have been operating in the United States since the 1980s. Des Jarlais, *supra* note 94, at 3.

<sup>160</sup> *See generally* THE OPIOID EPIDEMIC: FROM EVIDENCE TO IMPACT 42 (G. Caleb Alexander, et al. eds., Johns Hopkins Bloomberg Sch. of Pub. Health 2017) [hereinafter JOHNS HOPKINS].

<sup>161</sup> *Fact Sheet: President Donald J. Trump’s Initiative to Stop Opioid Abuse and Reduce Drug Supply and Demand*, WHITE HOUSE (Oct. 24, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-initiative-stop-opioid-abuse-reduce-drug-supply>



administration is truly dedicated to the expansion of “evidence-based addiction treatment” then it should welcome, not deter, states from implementing SIFs.

### III. AN ALTERNATIVE FOR ABUSE: SAFE INJECTION FACILITIES

Safe injection facilities (SIFs), also known as safe injection sites and consumption rooms, are places intravenous drug users can go to receive clean needles and inject pre-obtained drugs under the supervision of medical staff who monitor users to prevent overdose.<sup>162</sup> SIFs follow a harm reduction model that seeks to decrease potential adverse health effects resulting from users being forced to inject in public, abandoned buildings and other risky locations.<sup>163</sup> SIFs have three main quantifiable benefits: they reduce blood-borne illness and bacterial infections by providing clean needles, they provide immediate medical intervention to reduce overdose death and complications, and finally, they are a “stabilizing force” for drug users.<sup>164</sup> SIFs have been operating in Canada and Europe<sup>165</sup> for years, but are currently unavailable in the United States as they continue to be opposed by state and federal governments despite evidence of their effectiveness.<sup>166</sup>

#### A. *SIFs in Canada*

In 2003, Insite opened in Downtown Eastside (DTES) Vancouver, Canada as North America’s first SIF.<sup>167</sup> The DTES community was known for its large homeless population, open

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ly-demand-2/ [https://perma.cc/TAA4-8XE9]; Presidential Memorandum Addressing Prescription Drug Abuse and Heroin Use to the Heads of Executive Departments and Agencies (Oct. 21, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/10/21/presidential-memorandum-addressing-prescription-drug-abuse-and-heroin> [https://perma.cc/LKA2-BNXT].

<sup>162</sup> See *Heroin Addiction Safe Injection Sites*, BAART PROGRAMS, <https://baartprograms.com/heroin-addiction-safe-injection-sites/> [https://perma.cc/V6AS-QFG2]; see also EUROPEAN MONITORING CENTRE FOR DRUGS AND DRUG ADDICTION, *supra* note 26.

<sup>163</sup> See *Supervised Consumption Sites*, *supra* note 17; see also *supra* note 10 and accompanying text.

<sup>164</sup> See Amos Irwin et al., *Mitigating the Heroin Crisis in Baltimore, MD USA: A Cost Benefit Analysis of a Hypothetical Supervised Injection Facility*, 14:29 HARM REDUCTION 1, 2 (2017); Malkin, *supra* note 80, at 692.

<sup>165</sup> SIFs have been operating in Europe since the 1980s. There are currently seventy-eight SIFs operating across Europe, including Germany, the Netherlands, Spain, Norway, Luxembourg, Denmark, Greece, France, and most recently, in Ireland. See EUROPEAN MONITORING CENTRE FOR DRUGS AND DRUG ADDICTION, *supra* note 26, at 2.

<sup>166</sup> See Steffanie A. Strathdee & Robin A. Pollini, *A 21st-Century Lazarus: The Role of Safer Injection Sites in Harm Reduction and Recovery*, 102 ADDICTION 848, 848 (2007); *Heroin Addiction Safe Injection Sites*, *supra* note 162.

<sup>167</sup> See Kathleen Dooling & Michael Rachlis, *Vancouver’s Supervised Injection Facility Challenges Canada’s Drug Laws*, 182 CANADIAN MED. ASS’N J. 1440, 1440 (2010).

drug market, and high rates of drug use, overdose, and drug-related disorders.<sup>168</sup> Insite was established in DTES to combat these statistics.<sup>169</sup> In order to establish Insite, the regional health authority in Vancouver applied to the federal government for an exemption from Canada's Controlled Drugs and Substances Act (CDSA), a federal criminal law that prohibits possession and trafficking of controlled substances.<sup>170</sup> "This exemption was granted [after] feasibility data . . . suggested that a SIF [in DTES] had the potential to reduce public drug use, overdose deaths, and public disorder."<sup>171</sup> The exemption was also based on data from successful international SIFs that showed "SIFs are associated with reductions in needle sharing, syringe re-use, overdoses, injecting in public and numbers of publicly discarded syringes."<sup>172</sup>

This is not to say that Insite was established without opposition. Several years after Insite was established, the Canadian federal government decided not to grant Insite further exemptions under the CDSA and Insite's legality was challenged to the Canadian Supreme Court.<sup>173</sup> The Canadian Supreme Court, however, found that Insite fell within the CDSA's health facility exemption.<sup>174</sup>

Despite the opposition, it is evident that Insite provides a clean, safe environment for injection drug use that is supervised by nursing staff.<sup>175</sup> The staff "encourages users to seek counseling,

<sup>168</sup> See Brandon DL Marshall, et al., *Reduction in Overdose Mortality After the Opening North American's First Medically Supervised Safer Injecting Facility: A Respective Population-Based Study*, 377 LANCET 1429, 1429 (2011); see also Margot Young, *Context, Choice, and Rights: PHS Community Services v. Canada* (Attorney General), 44 U. B.C. L. REV. 221, 227–28 (2011) ("Poverty is palpable: people sleeping on the streets, open injection of heroin and smoking of crack. . . . The 'visible street scene in the DTES is directly related to . . . lack of access to private space.'" (quoting Susan Boyd, Donald MacPherson & Bud Osborn, *Raise Shit!: Social Action Saving Lives* 12 (Fernwood Publishing 2009))).

<sup>169</sup> See Marshall, *supra* note 168, at 1.

<sup>170</sup> See *Canada (A.G.) v. PHS Cmty. Health Serv. Soc'y*, [2011] 3 S.C.R. 134, 136 (2011) (Can.); B.C. CTR. FOR EXCELLENCE IN HIV/AIDS & URBAN HEALTH RESEARCH INITIATIVE, FINDINGS FROM THE EVALUATION OF VANCOUVER'S PILOT MEDICALLY SUPERVISED SAFER INJECTION FACILITY—INSITE 5 (2009), [http://www.bccsu.ca/wp-content/uploads/2016/10/insite\\_report-eng.pdf](http://www.bccsu.ca/wp-content/uploads/2016/10/insite_report-eng.pdf) [<https://perma.cc/6TRN-YV4P>] [hereinafter FINDINGS FROM THE EVALUATION OF VANCOUVER'S PILOT MEDICALLY SUPERVISED SAFER INJECTION FACILITY: INSITE].

<sup>171</sup> See FINDINGS FROM THE EVALUATION OF VANCOUVER'S PILOT MEDICALLY SUPERVISED SAFER INJECTION FACILITY: INSITE, *supra* note 170, at 7.

<sup>172</sup> Strathdee & Pollini, *supra* note 166, at 848–49; see also FINDINGS FROM THE EVALUATION OF VANCOUVER'S PILOT MEDICALLY SUPERVISED SAFER INJECTION FACILITY: INSITE, *supra* note 170, at 7.

<sup>173</sup> See Strathdee & Pollini, *supra* note 166, at 848–49; *PHS Cmty. Health Serv. Soc'y*, 3 S.C.R. at 136.

<sup>174</sup> See *PHS Cmty. Health Serv. Soc'y*, 3 S.C.R. at 139.

<sup>175</sup> HEALTH CANADA EXPERT ADVISORY COMM., VANCOUVER'S INSITE SERVICES AND OTHER SUPERVISED INJECTION SITES WHAT HAS BEEN LEARNED FROM RESEARCH—FINAL REPORT OF THE EXPERT ADVISORY COMMITTEE ON SUPERVISED INJECTION SITE

detoxification, and treatment.”<sup>176</sup> Insite does not provide illicit drugs to its clients—rather the drugs are illegally pre-obtained by the users, with roughly sixty percent of Insite clients using opioids.<sup>177</sup> A 2008 study reported results on Insite’s effects on DTES<sup>178</sup> and found that between 2003 and 2008 “[o]ver [eight thousand] people ha[d] visited Insite to inject drugs,”<sup>179</sup> that Insite staff had intervened in more than three hundred overdoses and that there were zero overdose deaths at the facility during the test period.<sup>180</sup> The report also cited that in the twelve weeks after Insite opened there was a reduction in public drug injection and “no evidence of increases in drug-related loitering, drug dealing, or petty crimes in areas around Insite.”<sup>181</sup> The study found increased utilization of detoxification and treatment services as Insite staff encouraged users to seek treatment.<sup>182</sup> Finally, the report found Insite cost just three million dollars annually to operate.<sup>183</sup> The report did note, however, that the study could not conclude whether Insite suggested to potential drug users that injection drug use could be safe.<sup>184</sup> Outstanding critics argue the analytical research is biased and insist that Insite enables users to “have more drugs.”<sup>185</sup>

Moreover, a 2018 study on SIFs internationally concluded that:

the benefits of providing supervised drug consumption facilities may include improvements in safe, hygienic drug use, . . . increased access to health and social services, and reduced public drug use and nuisance. There is no evidence to suggest that the availability of safer injection facilities increase drug use or frequency of injecting. These

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RESEARCH (Mar. 31, 2008) <https://www.canada.ca/en/health-canada/corporate/about-health-canada/reports-publications/vancouver-insite-service-other-supervised-injection-sites-what-been-learned-research.html> [<https://perma.cc/X7PK-6S2R>].

<sup>176</sup> *Id.*

<sup>177</sup> See Young, *supra* note 168, at 226.

<sup>178</sup> HEALTH CANADA EXPERT ADVISORY COMM., *supra* note 175.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* Another study found that Insite was associated with a thirty percent increased rate of entry into detoxification and reduced use of Insite. See Evan Wood, et al., *Rate of Detoxification Services Use and Its Impact Among a Cohort of Supervised Injecting Facility Users*, 102 ADDICTION 916, 917 (2007).

<sup>183</sup> HEALTH CANADA EXPERT ADVISORY COMM., *supra* note 175.

<sup>184</sup> *Id.*

<sup>185</sup> See Sue-Ann Levy, *Experts Challenge Vancouver’s Safe Injection Stats*, TORONTO SUN (Mar. 19, 2016, 6:05 PM EST), <http://torontosun.com/2016/03/19/experts-challenge-vancouvers-safe-injection-stats/wcm/6222caed-ec69-495d-bf22-22e052481ad4> [<https://perma.cc/T7YM-PUQ5>]. Insite opponents also argue that Insite “is an affront to federal control”—that it is not the role of government to facilitate drug use, and that SIFs do not deter drug use. See Steuck, *supra* note 25.

services facilitate rather than delay treatment entry and do not result in higher rates of local drug-related crime.<sup>186</sup>

The success of SIFs in Canada and abroad demonstrate that SIFs should not be considered controversial, but rather should be seen as a legitimate policy response to the opioid epidemic.

## B. *SIFs in the United States*

### 1. Legislative Framework

SIFs are illegal under the current conception of the CSA.<sup>187</sup> State and local governments, however, retain broad power to regulate for the public health; states are entitled to create their own statutory framework and are not required to enforce the CSA.<sup>188</sup> Indeed, the United States Supreme Court has held that states have broad authority to regulate the manufacture and sale of dangerous drugs through the police power—“the range of . . . choice[s] . . . which a State [has the power to] make in this area is undoubtedly . . . wide.”<sup>189</sup> Theoretically, a state or local government could institute a SIF through legislation, referendum, or administrative authority.<sup>190</sup> The main legal question, then, would be whether the federal government would enforce the CSA and declare SIFs illegal.<sup>191</sup> Because the CSA prohibits unauthorized possession of controlled substances, it is within the federal government’s authority to prosecute anyone who appears at a SIF with illegally obtained heroin.<sup>192</sup> Under the current legal framework, the United States Attorneys’ Offices could also target state-sanctioned SIF operators on the theory that they are in “constructive possession” of the illegally obtained drugs brought to the facility.<sup>193</sup> In that respect, the United States Deputy Attorney

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<sup>186</sup> EUROPEAN MONITORING CENTRE FOR DRUGS AND DRUG ADDICTION, *supra* note 26, at 6.

<sup>187</sup> See Georgi Boorman, *Why Safe Injection Sites for Drug Addicts Should Be Legal*, FEDERALIST (Feb. 16, 2017), <http://thefederalist.com/2017/02/16/why-safe-injection-sites-for-drug-addicts-should-be-legal/> [<https://perma.cc/M5XJ-P2LG>].

<sup>188</sup> See Burris et al., *supra* note 78, at 1105–06, 1135 (explaining the state police power).

<sup>189</sup> *Robinson v. California*, 370 U.S. 660, 665 (1962); *Minnesota ex rel. Whipple v. Martinson*, 256 U.S. 41, 45 (1921).

<sup>190</sup> See Burris et al., *supra* note 78, at 1106–12.

<sup>191</sup> See *id.* at 1112; see also Leo Beletsky, et al., *The Law (and Politics) of Safe Injection Facilities in the United States*, 98 AM. J. PUB. HEALTH 231, 231 (2008) (“Although states and some municipalities have the power to authorize SIFs under state law, federal authorities could still interfere with these facilities under the Controlled Substances Act.”).

<sup>192</sup> See Burris et al., *supra* note 78, at 1116.

<sup>193</sup> See *id.* (explaining that “[c]onstructive’ possession exists when circumstantial evidence establishes that the individual who is not actually in possession nonetheless has dominion and control over contraband”).

General Rod Rosenstein stated that cities considering establishing SIFs “should expect the Department of Justice to meet the opening of any injection site with swift and aggressive action.”<sup>194</sup> Regional United States Attorneys’ Offices have also stated that they are prepared to criminally prosecute SIF employees.<sup>195</sup>

The CSA also proscribes providing space for illegal drug use under the Crack House Statute.<sup>196</sup> SIF proponents argue the Crack House Statute does not actually give the federal government power to prosecute SIF operators because the CSA does not demonstrate an intent to displace state regulation of “effective health programs,” since “Congress has not made the requisite clear statement of an intention to displace the state’s regulation of what constitutes proper health care for and public health interventions among drug users.”<sup>197</sup> According to public health advocates, “the federal law was not intended to bar governments or medical authorities from responding to emergencies.”<sup>198</sup> Ultimately, however, the decision to enforce the statute is “up to the discretion of federal authorities.”<sup>199</sup> To this end, federal prosecutors have commented on how they construe the Crack House statute, stating, “[t]he properties that host SIFs would also be subject to federal forfeiture.”<sup>200</sup>

<sup>194</sup> Rosenstein, *supra* note 27.

<sup>195</sup> See Press Release, U.S. Att’y’s Office, Dist. of Mass., Statement from U.S. Attorney Andrew Lelling Regarding Proposed Injection Sites (July 19, 2018) <https://www.justice.gov/usao-ma/pr/statement-us-attorney-andrew-elling-regarding-proposed-injection-sites> [<https://perma.cc/A6FM-GW7W>] (“[SIFs]’ would violate federal laws prohibiting the use of illicit drugs and the operation of sites where illicit drugs are used and distributed. Employees and users of such a site would be exposed to federal criminal charges regardless of state law or study.”); Press Release, U.S. Att’y’s Office, Dist. of Vt., *supra* note 25 (“[P]roposed SIFs would violate several federal criminal laws . . . . It is a crime, not only to use illicit narcotics, but to manage and maintain sites on which such drugs are used and distributed. Thus, exposure to criminal charges would arise from users and SIF workers and overseers.”).

<sup>196</sup> 21 U.S.C. § 856 (2012); see also *supra* note 111 and accompanying text.

<sup>197</sup> See Burris et al., *supra* note 78, at 1124 (quoting 21 U.S.C. § 1101 (2006)). Under this argument, any attempt by the federal government to suppress a SIF would be regulatory over-reach. See *id.*

<sup>198</sup> Lenny Bernstein & Katie Zezima, *Cities Defiant After Justice Department’s Threat on ‘Supervised Injection Facilities’*, WASH. POST (Sept. 4, 2018), [https://www.washingtonpost.com/national/health-science/cities-defiant-after-justice-departments-threat-on-supervised-injection-sites/2018/09/04/fcf798d6-b056-11e8-a20b-5f4f84429666\\_story.html](https://www.washingtonpost.com/national/health-science/cities-defiant-after-justice-departments-threat-on-supervised-injection-sites/2018/09/04/fcf798d6-b056-11e8-a20b-5f4f84429666_story.html) [<https://perma.cc/Y5R2-HLJG>].

<sup>199</sup> William Neuman, *De Blasio Moves to Bring Safe Injection Sites to New York City*, N.Y. TIMES (May 3, 2018), <https://www.nytimes.com/2018/05/03/nyregion/nyc-safe-injection-sites-heroin.html> [<https://perma.cc/SG5G-TKDR>].

<sup>200</sup> Press Release, U.S. Att’y’s Office, Dist. of Vt., *supra* note 25.

## 2. Establishing a SIF in the United States

Despite the legal uncertainty, backing for SIFs has swiftly increased in recent years.<sup>201</sup> In 2017, the American Medical Association endorsed the creation of SIFs.<sup>202</sup> Legislators in at least eleven U.S. cities have introduced legislation or proposals to create or fund SIFs, including, most prominently New York City, Seattle, and Philadelphia.<sup>203</sup> In May 2018, for example, New York City Mayor Bill De Blasio endorsed SIFs and announced plans to implement a one-year pilot plan to open four “overdose prevention centers.”<sup>204</sup>

The City of Philadelphia announced in January of 2018 it would “encourage private sector development” of SIFs which the city would call “comprehensive user engagement sites” or CUES.<sup>205</sup> Philadelphia city officials maintain that they will continue to implement CUES despite warnings of federal prosecution; as Philadelphia’s Department of Public Health stated, “[j]ust as local governments had to lead during the HIV epidemic, cities like ours will be on the forefront . . . in the opioid crisis.”<sup>206</sup>

Likewise, in January of 2017, King County, Washington, which encompasses the City of Seattle, approved the creation of two SIFs; further, in June of 2018, Seattle moved towards creating a mobile “Community Health Engagement Location”—a safe injection van that would be parked in the same location every day.<sup>207</sup> In response to Deputy Attorney Rosenstein’s *New York*

<sup>201</sup> Nadelmann & LaSalle, *supra* note 72, at 3; JOHNS HOPKINS, *supra* note 160, at 32.

<sup>202</sup> Press Release, Am. Med. Ass’n, AMA Wants New Approaches to Combat Synthetic and Injectable Drugs (June 12, 2017), <https://www.ama-assn.org/ama-wants-new-approaches-combat-synthetic-and-injectable-drugs> [https://perma.cc/7M3M-7DVZ].

<sup>203</sup> See Ghorayshi, *supra* note 23. Other cities and states considering establishing a SIF include Ithaca, New York; Burlington, Vermont; Denver, Colorado; Madison, Wisconsin; Boston, Massachusetts; Washington, D.C.; Delaware and Rhode Island. *See id.*

<sup>204</sup> Neuman, *supra* note 199. According to the Mayor’s Office, the sites would be located in Washington Heights, and Midtown Manhattan; the Longwood section of the Bronx; and Brooklyn. *Id.*

<sup>205</sup> Press Release, City of Phila. Dep’t of Health, City Announces Progress on Opioid Task Force Recommendations (Jan. 23, 2018) <https://www.phila.gov/2018-01-23-city-announces-progress-on-opioid-task-force-recommendations/> [https://perma.cc/5BPX-K3NF]. The city maintains that CUES ensure people stay alive long enough to get treatment, lead to “fewer littered syringes,” offer users “access to treatment,” and “do not worsen crime or drug use.” *Comprehensive User Engagement Sites (CUES)*, CITY OF PHILA., [https://www.phila.gov/media/20180614163426/OTF\\_CUES-Fact-Sheet.pdf](https://www.phila.gov/media/20180614163426/OTF_CUES-Fact-Sheet.pdf) [https://perma.cc/VC44-9YCN].

<sup>206</sup> Bernstein and Zezima, *supra* note 198.

<sup>207</sup> David Gutman, *Seattle, King County Move To Open Nation’s First Safe Injection Sites for Drug Users*, SEATTLE TIMES (Jan. 27, 2017, 1:32 PM), <https://www.seattletimes.com/seattle-news/crime/seattle-king-county-move-to-create-2-injection-sites-for-drug-users/> [https://perma.cc/Y296-TNT8]; DeeDee Sun, *Seattle Moving Forward with ‘Fixed Mobile’ Safe Injection Site*, KIRO7 (June 7, 2018, 6:46 PM), <https://www.kiro7.com/news/local/seattle-moving-forward-with-fixed-mobile-safe->

*Times* Op-Ed, Seattle City Attorney Pete Holmes stated “his office [was] evaluating its options in light of Rosenstein’s threat.”<sup>208</sup> While it is unclear how these proposed SIFs will fare under President Trump’s drug abuse policy, it is evident that “Rosenstein’s statement rekindled tensions between federal and local authorities.”<sup>209</sup> Because of conflicting approaches between the federal and state governments, which not only highlight federalism concerns but the differences between punitive and harm reduction approaches to the opioid epidemic, the federal government should take a clear stance in support of SIFs.

#### IV. A SOLUTION TO ABUSE: A SAFE HARBOR IN THE OPIOID CRISIS

##### A. *The Need for a SIF Policy*

Drug policy in America needs to change. The federal and state governments have been legislating to curb drug use for over one hundred years, yet the comprehensive policies aimed at reaching a drug-free America have been vastly ineffective.<sup>210</sup> Under the CSA, “deadly heroin overdoses in the United States more than quadrupled from 2010 to 2015.”<sup>211</sup> These statistics paint a bleak picture of the U.S.’s so-called “war on drugs,” making it undeniably clear that this war has been a losing one.<sup>212</sup>

The current statutory framework takes a punitive approach that attempts to eradicate drug abuse through deterrence and

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injection-site/765093230 [https://perma.cc/9MB3-2273]. The impetus for the Community Health Engagement Location was a 2016 report by the Heroin and Prescription Opiate Addiction Task force created by Seattle Mayor Ed Murray which recommended a pilot program where users would receive clean needles and inject in a clean, supervised environment. See HEROIN AND PRESCRIPTION OPIATE ADDICTION TASK FORCE FINAL REPORT AND RECOMMENDATIONS 2 (Sept. 15, 2016).

<sup>208</sup> Vernal Coleman, *Threat of Federal Enforcement Complicates Seattle’s Proposed Safe Injection Site*, SEATTLE TIMES (Aug. 31, 2018, 3:56 PM), <https://www.seattletimes.com/seattle-news/homeless/threat-of-federal-enforcement-complicates-seattles-proposed-safe-injection-site/> [https://perma.cc/E5NS-X27J].

<sup>209</sup> *Id.*

<sup>210</sup> See *supra* notes 102–105 (explaining early federal drug legislation); Section II.A.3 (explaining the current state of drug legislation); Section I.A.3 (explaining the current opioid epidemic).

<sup>211</sup> See David Beasley, *Deadly U.S. Heroin Overdoses Quadrupled in 5 Years*, REUTERS (Feb. 24, 2017), <https://www.scientificamerican.com/article/deadly-u-s-heroin-overdoses-quadrupled-in-5-years/> [https://perma.cc/RS4Q-F3W4]; see *supra* Section I.A.3. (explaining the current opioid epidemic).

<sup>212</sup> See *Deterrence Theory and the War on Drugs*, MARCUSTREBELIUSMAXIMUS, <https://marcustmaximus.wordpress.com/2015/09/30/deterrence-theory-and-the-war-on-drugs/> [https://perma.cc/T22N-ZSR7].

shame.<sup>213</sup> The deterrence theory assumes that humans act rationally, weighing the costs of drug use (the probability of arrest, conviction, and severity of punishment against the benefits of using) against the benefits of getting a high.<sup>214</sup> People with drug addiction, however, are often caught in a cycle of drug abuse that ignores cost-benefit analysis.<sup>215</sup> A punitive policy that imposes heavy punishment to deter drug use is misplaced and demonstrates a fundamental misunderstanding of opioid addiction.

A policy change is necessary to reduce the startling negative effects of the opioid crisis. SIFs are a policy that is proven to reduce the harmful effects of injection heroin use.<sup>216</sup> First, SIFs are part of a harm reduction policy;<sup>217</sup> rather than trying to deter drug use through inflexible laws, SIFs acknowledge the realities of heroin addiction.<sup>218</sup> Injection drug users are at a significantly higher risk of overdose death than non-injection drug users<sup>219</sup> and SIFs can address this reality in ways that the current policies cannot.<sup>220</sup>

SIFs in the United States would likely be as successful as DTES's Insite in combatting the negative effects of injection heroin use. For example, Washington Heights in New York City has many of the same injection heroin demographics as DTES prior to Insite's establishment.<sup>221</sup> A 2017 article describes "an expressway off-ramp" in Washington Heights as "a popular spot for homeless drug addicts," and shows a picture of "alcohol pads, syringes, needle caps and sterile water packets scattered on the ground," all of which are used for injecting drugs.<sup>222</sup> As with Insite in DTES, a SIF in Washington Heights would keep both the community and users safe.

<sup>213</sup> See *supra* Section II.B.1 (explaining the punitive policy underlying current drug laws); Section I.C. (explaining the stigma and shame associated with the criminalization of drug abuse).

<sup>214</sup> See *Deterrence Theory and the War on Drugs*, *supra* note 212.

<sup>215</sup> See *supra* notes 86–92 and accompanying text (explaining the cycle of addiction that heroin users fall into).

<sup>216</sup> See *supra* notes 178–184 (explaining the SIF in Vancouver that led to a decrease in public heroin use and heroin-related overdose deaths).

<sup>217</sup> See *supra* Section II.B.2 (defining and explaining harm reduction theories).

<sup>218</sup> See Klein, *supra* note 151, at 449 (describing the goal of harm reduction policies as "elevating pragmatism over prohibitionist [policies]").

<sup>219</sup> See Bradley M. Mathers, et al., *Mortality Among People Who Inject Drugs: A Systematic Review and Meta-Analysis*, 91 BULL. WORLD HEALTH ORG. 102, 111 (2013), <http://www.who.int/bulletin/volumes/91/2/12-108282/en/> [<https://perma.cc/FN8K-YPBB>].

<sup>220</sup> See *supra* note 119 and accompanying text.

<sup>221</sup> Compare Razi Syed, *On the Front Line of the Heroin Epidemic in Washington Heights*, PAVEMENT PIECES (Mar. 2, 2017, 4:41 PM), <http://pavementpieces.com/on-the-front-line-of-the-heroin-epidemic-in-washington-heights/> [<https://perma.cc/2GGD-MWTS>], with sources cited *supra* notes 167–169 and accompanying text (describing the demographics of DTES, Vancouver prior to the establishment of Insite).

<sup>222</sup> See Syed, *supra* note 221.



Although the Corner Project is in Washington Heights,<sup>223</sup> it considers itself “just a bathroom,” not a SIF.<sup>224</sup> Because the Washington Heights streets are still littered with drug paraphernalia and overdose rates in New York City continue to increase,<sup>225</sup> “just a bathroom” is insufficient. An established SIF like Insite with trained medical staff and built-in booths would better address the heroin crisis in the United States. A state sanctioned SIF would also reduce stigma and draw in more clients, reducing the adverse consequences of public drug injection.<sup>226</sup>

### B. *The Need for a Federal Stance on SIFs*

The philosophical underpinning of punitive drug policies is that drugs are morally wrong.<sup>227</sup> This philosophy was bolstered by President Nixon’s declaration of a war on drugs that led to a comprehensive criminalization of illicit substances.<sup>228</sup> Harm reduction, on the other hand, focuses on destigmatizing drug addiction by removing the idea that drug addiction is a moral defect.<sup>229</sup> Much of the criticism of harm reduction policies, specifically with SIFs, is that they are essentially giving drug use the government imprimatur of approval,<sup>230</sup> conflicting with the punitive policy that drugs are immoral. For SIFs to gain widespread public support, it is incumbent on the federal government to begin reshaping public perception of illicit drugs, take an affirmative stance on SIFs to destigmatize drug addiction, and affirm SIFs as a legitimate and necessary response to the opioid public health emergency.<sup>231</sup> Despite contradictory messaging from the DOJ,<sup>232</sup> the Trump Administration has otherwise, not only acknowledged that the federal government plays an important role in reducing the stigma surrounding drug addiction, but has made

<sup>223</sup> See Gupta, *supra* note 3.

<sup>224</sup> See *id.*

<sup>225</sup> See *Health Department Releases New Data on Heroin and Fentanyl Overdose Deaths in New York City*, NYC HEALTH (Aug. 9, 2016), <https://www1.nyc.gov/site/doh/about/press/pr2016/pr063-16.page> [<https://perma.cc/BR4F-4GHA>] (finding that opioid-related overdose deaths had increased in four of the five New York City boroughs, and that “heroin was involved in [fifty-nine] percent of drug overdose deaths”).

<sup>226</sup> See *supra* Section II.B.2 and Part III (explaining that one of the goals of SIFs, such as Insite, is to reduce the stigma associated with injection drug use).

<sup>227</sup> See *supra* notes 144–146 and accompanying text.

<sup>228</sup> See *supra* Section II.A.1; see also *supra* notes 93, 97 and accompanying text (explaining that criminalization of illicit drug use has exacerbated the stigma associated with drug abuse).

<sup>229</sup> See *supra* Section II.B.2.

<sup>230</sup> See *supra* notes 25–26 and accompanying text (explaining that SIF critics believe that government sanctioned SIFs condone or approve drug use).

<sup>231</sup> See *supra* note 42 and accompanying text (stating that in 2017, the Trump Administration declared the opioid epidemic to be a “public health emergency.”).

<sup>232</sup> See *supra* notes 27–35 and accompanying text.

it a policy priority, stating, “By promoting, supporting, and celebrating recovery, we can reduce stigma and offer hope and encouragement to those struggling with this incredibly difficult disease.”<sup>233</sup> Instead of threatening SIF proponents, the federal government should, in line with its stated policy priorities, promote and support SIFs.

### C. *Introducing a SIF in the Dual System of State and Federal Government*

The CSA essentially outlaws SIFs.<sup>234</sup> The federal government can, however, allow states to open SIFs in one of two ways: first, by clarifying the meaning of the “Crack House statute” so that SIFs are qualifying healthcare facilities that states have power to regulate;<sup>235</sup> or, by agreeing not to interfere with state and locally sanctioned SIFs.<sup>236</sup>

#### 1. The Federal Government Should Clarify That SIFs Are Healthcare Facilities That Are Not Proscribed by the “Crack House” Provision of the CSA

States have the authority to establish SIFs under their broad power to legislate for the public welfare.<sup>237</sup> The difficulty for states under the current legislative scheme is the uncertainty associated with acting in contravention of federal law.<sup>238</sup> Congress can eliminate uncertainty and encourage SIF establishment by amending the CSA to clarify that SIFs are healthcare facilities which states retain the power to regulate.<sup>239</sup> Like the Canadian

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<sup>233</sup> OFFICE OF NAT’L DRUG CONTROL POLICY, NATIONAL DRUG CONTROL STRATEGY 12 (2019), <https://www.whitehouse.gov/wp-content/uploads/2019/01/NDCS-Final.pdf> [<https://perma.cc/JXY3-UNBV>].

<sup>234</sup> See *supra* note 110 and accompanying text (explaining that the CSA makes it illegal to possess illicit substances); *supra* note 111 and accompanying text (explaining a provision of the CSA that makes it illegal for a property owner to knowingly allow drug possession or use on his or her property).

<sup>235</sup> See *supra* note 111 (explaining the so-called “Crack House” statute as a provision of the CSA that makes it illegal for a property owner to knowingly allow drug possession or use on his or her property); see also 21 U.S.C. § 822 (2012)).

<sup>236</sup> See *supra* Section II.A.2.b.

<sup>237</sup> See *Burris et al.*, *supra* note 78, at 1113. (explaining that states have the so-called “police power” to regulate for the public welfare and that the states are not required to enforce the CSA).

<sup>238</sup> See *supra* notes 124–134 and accompanying text (explaining that under the CSA, states retain the power to regulate healthcare facilities); see also *supra* notes 169–172 and accompanying text (explaining that Insite legally operates as a healthcare facility under an exception to the Canadian CSDA).

<sup>239</sup> See *supra* notes 196–198.

federal government,<sup>240</sup> Congress can condition the exception to apply only where feasibility studies are done that demonstrate a proposed SIF site would reduce needle sharing, syringe reuse, overdose, public injection, and publicly discarded needles. Congress could also require any SIF to report annual statistics or even require that potential SIF clients complete a training course on detoxification, rehabilitation, and the dangers of injection heroin use before being able to use the facility.

## 2. The Federal Government Should Announce a Policy of Noninterference with State Sanctioned SIFs

Alternatively, the executive branch can act, or perhaps better said, not act. The executive branch could instruct the United States Attorneys' Offices to refrain from prosecuting SIF owners, operators, or clients. This would be similar to the Obama-era policy of noninterference with state marijuana laws.<sup>241</sup> The Obama administration's policy of non-interference with state marijuana legalization was based on a determination that prosecuting those who possessed marijuana in accordance with state law was an inefficient allocation of federal resources.<sup>242</sup> This notion is transferable to state sanctioned SIFs as the benefits of SIFs are numerous and well-documented.<sup>243</sup> This is true despite the fact that marijuana is an arguably less dangerous drug than heroin: under decades of resources being allocated to support punitive punishments for heroin use, addiction has been able to flourish and overdoses have wreaked havoc. Prosecuting those who possess heroin in a SIF would be an inefficient allocation of federal resources.<sup>244</sup> Moreover, similar to opponents of the Cole Memo, SIF opponents may argue that a policy of noninterference may "send[] the wrong message" that the government has surrendered in the war on drugs.<sup>245</sup> Yet this metaphorical concern does nothing to address the literal loss of life that is caused by the opioid crisis; rather, SIFs have been proven to save lives. Like President Obama, therefore, President Trump's attorney general

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<sup>240</sup> See FINDINGS FROM THE EVALUATION OF VANCOUVER'S PILOT MEDICALLY SUPERVISED SAFER INJECTION FACILITY: INSITE, *supra* note 170, at 7–8.

<sup>241</sup> See Cole Memo, *supra* note 138, at 1–2.

<sup>242</sup> See Christopher Ingraham, *What the Future of Marijuana Legalization Could Look Like Under President Trump*, WASH. POST (Nov. 9, 2016), [https://www.washingtonpost.com/news/wonk/wp/2016/11/09/what-the-future-of-marijuana-legalization-could-look-like-under-president-trump/?utm\\_term=.9595d455b945](https://www.washingtonpost.com/news/wonk/wp/2016/11/09/what-the-future-of-marijuana-legalization-could-look-like-under-president-trump/?utm_term=.9595d455b945) [<https://perma.cc/63KV-UBRV>].

<sup>243</sup> See *supra* Part III (describing the benefits of SIFs).

<sup>244</sup> See Cole Memo, *supra* note 138, at 1–2.

<sup>245</sup> Ashley Southall & Jack Healy, *U.S. Won't Sue to Reverse States' Legalization of Marijuana*, N.Y. TIMES (Aug. 29, 2013), <https://www.nytimes.com/2013/08/30/us/politics/us-says-it-wont-sue-to-undo-state-marijuana-laws.html> [<https://perma.cc/JF22-E9VT>].

should write a memorandum to the United States Attorneys' Offices directing United States Attorneys not to prosecute SIF clients or owners. This would ensure that users can utilize SIFs without fear of being arrested or prosecuted and ultimately result in fewer overdoses and deaths.

## CONCLUSION

The heroin epidemic is a grave public health crisis.<sup>246</sup> Policy changes are necessary. SIFs, which have had great success in other nations, are a policy that would be successful in combatting the opioid epidemic. The federal government should not be an impediment to state decisions to implement SIFs. While the Obama administration moved toward a more liberal drug policy,<sup>247</sup> the Trump administration may not be quite so willing to do the same; despite the Trump administration's declaration of opioid abuse as public health emergency, the administration's drug policies have been far more conservative than its predecessor.<sup>248</sup> Therefore, although a harm reduction focused policy change is necessary to combat the heroin public health emergency, real change may have to wait.

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<sup>246</sup> See Andrew Sullivan, *The Opioid Epidemic is This Generation's AIDS Crisis*, N.Y. MAG. (Mar. 16, 2017), <http://nymag.com/intelligencer/2017/03/the-opioid-epidemic-is-this-generations-aids-crisis.html> [https://perma.cc/D8KR-BFUC].

<sup>247</sup> See Tony Newman, *Looking Back: Obama's Historic Efforts to Roll Back the Drug War and Tackle Mass Incarceration*, ALTERNET (Jan. 19, 2017), <https://www.alternet.org/drugs/president-obama-drug-policy> [https://perma.cc/3833-XMDR]; Catherine Saint Louis & Matt Apuzzo, *Obama Administration Set to Remove Barrier to Marijuana Research*, N.Y. TIMES (Aug. 10, 2016), <https://www.nytimes.com/2016/08/11/science/obama-administration-set-to-remove-barrier-to-marijuana-research.html> [https://perma.cc/J892-3ECQ]; Drake Baer, *5 Countries Experimenting With Liberal Drug Laws*, BUSINESS INSIDER (Mar. 30, 2016, 4:00 PM) <http://www.businessinsider.com/countries-experimenting-with-liberal-drug-laws-2016-3/#the-country-most-closely-associated-with-drug-use-and-drugged-out-tourists-is-probably-the-netherlands-1> [https://perma.cc/9DD8-KBWQ].

<sup>248</sup> See Sarah N. Lynch, *Trump Administration Drops Obama-Era Easing of Marijuana Prosecutions*, REUTERS (Jan. 4, 2018, 9:39 AM), <https://www.reuters.com/article/us-usa-justice-marijuana/trump-administration-drops-obama-era-easing-of-marijuana-prosecutions-idUSKBN1ET1MU> [https://perma.cc/Y5LZ-F63F]; Lois Beckett, *How Jeff Sessions and Donald Trump Restarted the War on Drugs*, GUARDIAN (Aug. 21, 2017, 2:00 AM EDT), <https://www.theguardian.com/us-news/2017/aug/21/donald-trump-jeff-sessions-war-on-drugs> [https://perma.cc/ZSK7-5N4C]; Don Winslow, *President Trump's War on Drugs Is Catastrophic*, TIME (June 20, 2017), <http://time.com/4825099/don-winslow-trump-drug-policy/> [https://perma.cc/8LU5-NFVN]; Ingraham, *supra* note 242.

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